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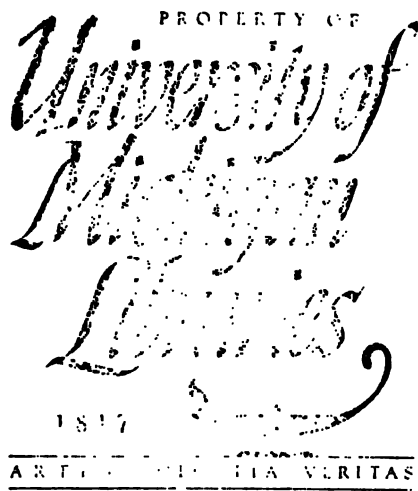
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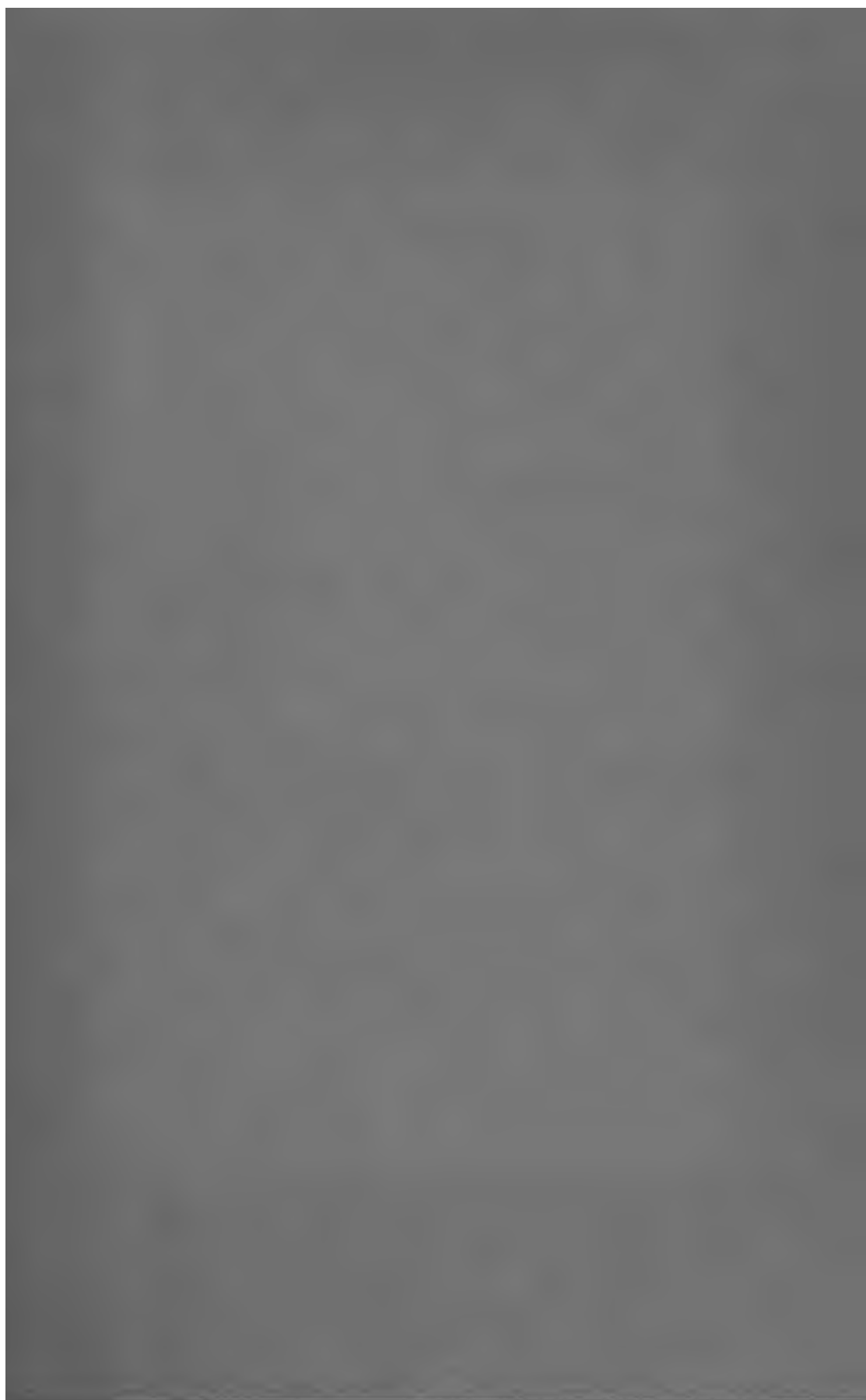
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THE
AMERICAN JOURNAL
OF
INTERNATIONAL LAW



VOLUME I.

PART I.

JANUARY AND APRIL, 1907.

PUBLISHED FOR
THE AMERICAN SOCIETY OF INTERNATIONAL LAW
BY
BAKER, VOORHIS & COMPANY,
NEW YORK, U. S. A.

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TABLE OF CONTENTS, VOLUME ONE

PART I.

NUMBER 1, JANUARY, 1907.

THE NEED OF POPULAR UNDERSTANDING OF INTERNATIONAL LAW. <i>Elihu Root</i> , Secretary of State	1
INTERNATIONAL RESPONSIBILITY TO CORPORATE BODIES FOR LIVES LOST BY OUTLAWRY. <i>John W. Foster</i> , formerly Secretary of State.....	4
INTERNATIONAL LAW; ITS PRESENT AND FUTURE. <i>John Bassett Moore</i> , Pro- fessor of International Law in Columbia University.....	11
DOCTOR FRANCIS LIEBER'S INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES IN THE FIELD. <i>George B. Davis</i> , Judge Advocate General, United States Army	13
THE CALVO AND DRAGO DOCTRINES. <i>Amos S. Hershey</i> , Professor of Interna- tional Law in the University of Indiana.....	26
INSURGENCY AND INTERNATIONAL MARITIME LAW. <i>George Grafton Wilson</i> , Professor of International Law in Brown University.....	46
THE DOCTRINE OF CONTINUOUS VOYAGES. <i>Charles Burke Elliott</i> , Justice of the Supreme Court of Minnesota.....	61
NOTES ON SOVEREIGNTY. <i>Robert Lansing</i>	105
BOARD OF EDITORS	129
EDITORIAL COMMENT	129
Prospectus	130
Constitution	131
Societies of International Law.....	135
Carlos Calvo	137
The Algeciras Conference	138
Lake Mohonk Conference on International Arbitration, 1906.....	140
The Peace of the Marblehead.....	141
Mr. Root's South American Trip.....	143
The Newfoundland Fisheries	144
The Nature of the Government in Cuba.....	149
The Japanese School Question.....	150
CHRONICLE OF INTERNATIONAL EVENTS. <i>Henry G. Crocker</i>	154
PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW, 1906. <i>Philip De Witt</i> <i>Phair</i>	186

249075

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW.....	200
Petit, United States Marshal for the District of Indiana, v. Walshe.....	200
Wright v. Henkel	202
State of Missouri v. State of Nebraska, and State of Nebraska v. State of Missouri	203
Louisiana v. Mississippi	204
Ortega v. Lara	208
The United States v. The Paquete Habana.....	209
Ribas y Hijo v. United States.....	210
Colombia v. Cauca Company.....	212
Northern Pacific Railway Company v. American Trading Company.....	214
Missouri v. Illinois	215
Kansas v. Colorado	215
West Rand Gold Central Mining Company, Limited, v. The King.....	217
Decision by the Swiss Federal Court Concerning the International and Constitutional Effects of Territorial Possession and the Duty of a Succeeding State to Recognize the Concessions Granted by its Predecessor.....	235
BOOK REVIEWS: BOOK NOTES.....	250
American Diplomacy: Its Spirit and Achievements. <i>John Bassett Moore</i> ..	250
Recueil des Arbitrages Internationaux. <i>A. de Lapradelle</i> , and <i>N. Politis</i> ..	252
A Digest of International Law. <i>John Bassett Moore</i>	254
The Practice of Diplomacy as Illustrated in the Foreign Relations of the United States. <i>John W. Foster</i>	257
The Aliens Act and the Right of Asylum. <i>N. W. Sibley</i> and <i>Alfred Elias</i> ..	260
Report of French-Venezuelan Mixed Claims Commission Under Protocol of 1902. <i>Jackson H. Kalston</i> , assisted by <i>W. T. S. Doyle</i>	261
The Legislative History of Naturalization in the United States from the Revolutionary War to 1861. <i>Frank George Franklin</i>	262
International Law: A Treatise. <i>David J. Brewer</i>	263
American Consular Jurisdiction in the Orient. <i>Frank E. Hinckley</i>	264
Manuel de droit International public. <i>Henry Bonfils</i>	264
Völkerrechtsquellen in Auswahl herausgegeben. <i>Max Fleischmann</i>	264
The Purchase of Florida: Its History and Diplomacy. <i>Herbert Bruce Fuller</i>	265
The Consular Service of the United States: Its History and Activities. <i>Chester Lloyd Jones</i>	265
The Manuel Historique de la Question du Schlesvig. <i>Franz de Jessen</i> , editor.	265
La république et le canal de Panama. <i>Henri Pansa</i>	265
La Question d'Égypte. <i>Charles de Freycinet</i>	266
International Law with Illustrative Cases. <i>Edwin Macey</i>	266
Early Diplomatic Negotiations of the United States with Russia. <i>John C. Hildt</i>	266
Traité de la France avec les pays de l'Afrique du Nord. <i>E. Rouard de Card</i>	266
Recueil international des traités du XXe Siècle. <i>Baron Deschamps</i> and <i>Louis Renault</i> , editors.....	266

TABLE OF CONTENTS

V

BOOK REVIEWS: BOOK NOTES — Continued.

A Practical Guide for Russian Consular Officers. <i>A. Heyking</i>	266
La Traité Négrière aux Indes de Castille. Contrats et traités d'Assiento. <i>Georges Scelle</i>	266
L'Affaire Marocaine. <i>Victor Bérard</i>	267
La diplomatie de la troisième république et le droit des gens. <i>Frantz Despaget</i>	267
Histoire de la Représentation Diplomatique de la France auprès des Cantons Suisses. Vol. III. <i>Edouard Rott</i>	267
Les lois de la guerre continentale. <i>Paul Carpentier</i> , translator.....	267
Zeitschrift für Völkerrecht und Bundesstaatsrecht. <i>Josef Kohler</i> , editor..	267
Rivista di diritto internazionale.....	267
Revista de derecho internacional y política exterior. <i>Marquis de Olivart</i> , editor.....	267
Krieg und Seekabel. Eine völkerrechtliche Studie. <i>Franz Scholz</i>	267
Les Cables sous-marins, leur protection en temps de paix et en temps de guerre. <i>Pierre Jouhannaud</i>	267
Der Tatbestand der Piraterie nach geltendem Völkerrecht. <i>Paul Stiel</i>	267
Die Kriegskonterbande in der Völkerrechtswissenschaft und der Staaten- praxis. <i>Max Wiegner</i>	268
Das Untersuchungsrecht des internationalen Seerechts in Krieg und Frieden. <i>Max J. Lowenthal</i>	268
Manuel diplomatique et consulaire. <i>R. Monnet</i>	268
The Law of Aliens and Naturalization. <i>H. S. I. Hemiques</i>	268
Spanish-American Diplomatic Relations preceding the War of 1898. <i>H. E. Flack</i>	268
The Report of the Twelfth Annual Meeting of the Lake Mohonk Confer- ence on International Arbitration, 1906.....	268
Régimen internacional de los rios navegables. <i>Ismael López</i>	268
The International Position of Japan as a Great Power. <i>Saiji George Hishida</i>	268
Essais d'histoire diplomatique américaine. <i>Achille Viallate</i>	268
Les lois de la guerre et la neutralité. <i>Fernand Verraes</i>	269
Le droit international; Les principes, les théories, les faits. <i>Ernest Nys</i> ..	268
International Documents, a collection of Conventions and other inter- national acts of a law-making kind. <i>E. A. Whittuck</i>	269
International Law and Diplomacy of the Russo-Japanese War. <i>Amos S. Hershey</i>	269
PERIODICAL LITERATURE OF INTERNATIONAL LAW, 1906.....	270

NUMBER 2, APRIL, 1907.

THE REAL QUESTION UNDER THE JAPANESE TREATY AND THE SAN FRANCISCO SCHOOL BOARD RESOLUTION. Address by the President of the American Society of International Law. <i>Elihu Root</i>	273
THE CONVENTION OF 1907 BETWEEN THE UNITED STATES AND THE DOMINICAN REPUBLIC. <i>Jacob B. Hollander</i>	287

NOTES ON SOVEREIGNTY IN A STATE. <i>Robert Lansing</i>	297
SOME SUGGESTIONS AS TO THE PERMANENT COURT OF ARBITRATION. <i>Jackson</i> <i>H. Ralston</i>	321
INTERNATIONAL ARBITRATION. <i>William L. Penfield</i>	330
A PERMANENT TRIBUNAL OF INTERNATIONAL ARBITRATION: ITS NECESSITY AND VALUE. <i>R. Floyd Clarke</i>	342
THE GENEVA CONVENTION OF 1906. <i>George B. Davis</i>	409
THE DEVELOPMENT OF INTERNATIONAL LAW. <i>Richard Olney</i>	418
BOARD OF EDITORS.....	431
EDITORIAL COMMENT.	
The Second Peace Conference of The Hague.....	431
The Dissolution of the Union of Norway and Sweden.....	440
The International Status of Korea.....	444
Japanese Situation.....	449
The New Immigration Law.....	452
The New Citizenship Law.....	458
The Question of Expulsion.....	462
Transit in Extradition Cases.....	465
Extraterritoriality and the United States Court for China.....	469
Anglo-American Relations.....	480
Anglo-French Convention Respecting the New Hebrides.....	482
The Abolition of "Prize Money".....	483
Anglo-French-Italian Agreement Regarding Abyssinia.....	484
The Joris Case and the Turkish Capitulations.....	485
Resolutions Adopted by the Institute of International Law, at Ghent, in September, 1906.....	485
Annual Meeting of the American Society of International Law.....	486
CHRONICLE OF INTERNATIONAL EVENTS. <i>Henry G. Crocker</i>	488
PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW. <i>Philip De Witt</i> <i>Phair</i>	504
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW.....	511
A. C. de Baca, et al., v. The United States and the Navajo Indians.....	511
Chauncey Thomas v. The United States.....	513
The Philippine Sugar Estates Development Company (Limited) v. The United States.....	514
Warner, Barnes and Co. (Ltd.) v. The United States.....	517
Galban and Company, a Corporation, v. The United States.....	518
Charles F. Wyman, Petitioner; John W. M'Evoy, Public Administrator, v. Charles F. Wyman.....	520
Zartarian v. Billings. Supreme Court of the United States.....	523
Mortensen v. Peters (High Court of Justiciary of Scotland).....	526
BOOK REVIEWS: BOOK NOTES.....	544
Les Sanctions de L'Arbitrage International. <i>Jacques Dumas</i>	544
Report on the Subject of Citizenship, Expatriation, and Protection Abroad. <i>James B. Scott, David Jayne Hill, and Gaillard Hunt</i>	548

TABLE OF CONTENTS

VII

BOOK REVIEWS: BOOK NOTES — *Continued.*

Die Kodifikation des Automobilrechts. <i>Fr. Meili</i>	554
Automobile Regulations of France and Other Countries. <i>H. Cleveland Coxe</i>	554
A History of Diplomacy in the International Development of Europe. <i>David Jayne Hill</i> . Vol. II.....	556
The Establishment of Territorial Sovereignty.....	556
Droit International. Les lois de la guerre et la neutralité. <i>Fernand Verraes</i>	558
Lettres et papiers du Chancelier Comte de Nesselrode. 1760-1850. <i>A. de Nesselrode</i> , editor	559
La doctrine de Monroë et l'Amérique Latine. <i>Daniel Antokoletz</i>	559
Commerce in War. <i>L. A. Atherty-Jones</i> , assisted by <i>H. H. L. Bellot</i>	559
Revista de derecho internacional y política exterior. Vol. II, No. 4.....	560
La codification du droit international privé. Bulletin des conférences de la Haye. <i>T. M. C. Asser</i> , editor.....	560
Questions of International Law and Diplomacy Involved in the Spanish-American War. <i>E. J. Benton</i>	560
Revue Générale de droit international public. <i>Joseph Delpech's</i> article on the revision of the Geneva Convention.....	560
Fahnenflucht und Verletzung der Wehrpflicht durch Auswanderung. Eine rechtswissenschaftliche und politische Studie zu den Deutsch-amerikanischen Bancroftverträgen. <i>Ludwig Bendix</i>	560
La fondation de l'empire allemand. <i>Ernest Denis</i>	560
Das Kriege recht zu Lande in seiner neuesten Gestaltung. <i>Albert Zorn</i>	560
The History of the Papacy in the XIX Century. <i>Fredrik Nielsen</i>	560
International Law. <i>L. Oppenheim</i>	561
The International Law and Diplomacy of the Russo-Japanese War. <i>Amos S. Hershey</i>	561
The Austinian Theory of War. <i>W. Jethro Brown</i>	561
PERIODICAL LITERATURE OF INTERNATIONAL LAW.....	562

PART II.

NUMBER 3, JULY, 1907.

THE INTERNATIONAL CONGRESSES AND CONFERENCES OF THE LAST CENTURY AS FORCES WORKING TOWARD THE SOLIDARITY OF THE WORLD. <i>Simeon E. Baldwin</i>	565
INTERNATIONAL UNIONS AND THEIR ADMINISTRATION. <i>Paul S. Reinsch</i>	579
AMERICAN IDEALS OF INTERNATIONAL RELATIONS. <i>Albert Bushnell Hart</i>	624
THE EXTENT AND LIMITATIONS OF THE TREATY-MAKING POWER UNDER THE CONSTITUTION. <i>Chandler P. Anderson</i>	636
SECOND PEACE CONFERENCE AT THE HAGUE. <i>David J. Hill</i>	671
STATE LOANS IN THEIR RELATION TO INTERNATIONAL POLICY. <i>Luis M. Drago</i> , 692	

BOARD OF EDITORS.....	727
EDITORIAL COMMENT.	
The National Arbitration and Peace Conference of New York.....	727
First Annual Meeting of the American Society of International Law....	729
The Growth of International Law under a Permanent Court of Arbitra- tion	730
The Assassination of Gen. Barrillas.....	734
The Association of International Law.....	739
The Fur Seal Question.....	742
The Recent Agreements Concluded Between Japan and France.....	748
The Supplement.....	749
CHRONICLE OF INTERNATIONAL EVENTS. <i>Henry G. Crocker</i>	750
PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW. <i>Philip De Witt</i>	
<i>Phair</i>	761
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW.....	767
The State of Kansas v. The State of Colorado et al.....	767
Pearcy v. Stranahan.....	784
United States of America v. C. A. Biddle.....	793
BOOK REVIEWS: BOOK NOTES.....	797
A History of Diplomacy in the International Development of Europe. <i>David Jayne Hill</i> . Vol. I.....	797
<i>Traite de Droit Public International. A. Merignhac</i>	800
<i>Le Droit International, Les Principes, Les Theories, Les Faits. Ernest</i> <i>Nys</i>	801
A Treatise on the Law of Naturalization of the United States. <i>Frederick</i> <i>Van Dyne</i>	802
Proceedings of the National Arbitration and Peace Congress, New York, April, 1907. <i>Robert Erskine Ely</i> , editor.....	804
PERIODICAL LITERATURE OF INTERNATIONAL LAW.....	805
APPENDIX — List of memorable international conferences, etc., appended to the above article, by <i>Hon. Simeon E. Baldwin</i>	808

NUMBER 4, OCTOBER, 1907.

THE LEGAL NATURE OF INTERNATIONAL LAW. <i>James Brown Scott</i>	831
THE HISTORY OF THE DEPARTMENT OF STATE. <i>Gaillard Hunt</i>	867
THE AMERICAN CONSULAR SERVICE. <i>Wilbur J. Carr</i>	891
CITIZENSHIP AND ALLEGIANCE IN CONSTITUTIONAL AND INTERNATIONAL LAW. <i>W. W. Willoughby</i>	914
WOULD IMMUNITY FROM CAPTURE, DURING WAR, OF NON-OFFENDING PRIVATE PROPERTY UPON THE HIGH SEAS BE IN THE INTEREST OF CIVILIZATION? <i>C. H. Stockton</i>	930
BOARD OF EDITORS.....	944

TABLE OF CONTENTS

IX

EDITORIAL COMMENT.

The January Journal.....	944
The Second Peace Conference of The Hague.....	945
The Integrity of China and the "Open Door"	954
The Northeastern Fisheries Question.....	963
Secretary Root's Visit to Mexico.....	964
The Regulation of Immigration and the Doctrine of Expatriation.....	967
The Case of Johnson v. Browne.....	970
The Meeting of the International Law Association at Portland.....	971
Recent Disturbances in Morocco.....	975
The San Dominican "Enabling Act".....	978
The Recent Anglo-Russian Convention.....	979
The Dispute between the Argentine Republic and Uruguay as to their Jurisdiction in the Rio de la Plata.....	984

CHRONICLE OF INTERNATIONAL EVENTS. *Henry G. Crocker*..... 989

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW. *Philip De Witt Phair*1009

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW.

Baird v. Walker.....	1016
Browne v. United States.....	1018
Johnson v. Browne.....	1022
In the Matter of the Probate of the Will of Young John Allen.....	1029
Von Thodorovich v. Franz Josef Beneficial Association.....	1039

BOOK REVIEWS: BOOK NOTES.

International Law as Interpreted During the Russo-Japanese War. <i>F. E. Smith</i> and <i>N. W. Sibley</i>	1044
The International Law and Diplomacy of the Russo-Japanese War. <i>Amos S. Hershey</i>	1044
La Proprieta Privata Nelle Guerre Marittime Secondo Il Diritto Inter- nazionale Pubblico. <i>Tullio Giordana</i>	1052
Commerce in War. <i>L. A. Atherly-Jones</i> (assisted by <i>Hugh H. L. Bellot</i>) ..	1053
Problems of International Practice and Diplomacy with Special Reference to The Hague Conferences and Conventions and other General Inter- national Agreements. <i>Sir Thomas Barclay</i>	1056
Arbitration in Latin America. <i>Gonzalo de Quesada</i>	1061
Report of the Thirteenth Annual Meeting of the Lake Mohonk Confer- ence on International Arbitration, 1907.....	1062

PERIODICAL LITERATURE OF INTERNATIONAL LAW.....1065

ANNOUNCEMENT

The first issue of the AMERICAN JOURNAL OF INTERNATIONAL LAW aims to cover the year 1906. Hereafter each number will deal wholly or principally with the quarter immediately preceding the date of issue. It is therefore expected that the size of the JOURNAL will be lessened in proportion, but the space devoted to the leading articles will remain approximately the same.

JAMES BROWN SCOTT,

January, 1907.

Managing Editor.

THE NEED OF POPULAR UNDERSTANDING OF INTERNATIONAL LAW

The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international rights and duties.

Governments do not make war nowadays unless assured of general and hearty support among their people; and it sometimes happens that governments are driven into war against their will by the pressure of strong popular feeling. It is not uncommon to see two governments striving in the most conciliatory and patient way to settle some matter of difference peaceably, while a large part of the people in both countries maintain an uncompromising and belligerent attitude, insisting upon the extreme and uttermost view of their own rights in a way which, if it were to control national action, would render peaceable settlement impossible.

One of the chief obstacles to the peaceable adjustment of international controversies is the fact that the negotiator or arbitrator who yields any part of the extreme claims of his own country and concedes the reasonableness of any argument of the other side is quite likely to be violently condemned by great numbers of his own countrymen who have never taken the pains to make themselves familiar with the merits of the controversy or have considered only the arguments on their own side. Sixty-four years have passed since the northeastern boundary between the United States and Canada was settled by the Webster-Ashburton treaty of 1842; yet to this day there are many people on our side of the line who condemn Mr. Webster for sacrificing our rights, and many people on the Canadian side of the line who blame Lord Ashburton for sacrificing their rights, in that treaty. Both sets of objectors cannot be right; it seems a fair inference that neither of them is right; yet both Mr. Webster and Lord Ashburton had to endure reproach and obloquy as the price of agreeing upon a settlement which has been worth to the peace and prosperity of each

country a thousand times as much as the value of all the territory that was in dispute.

In the great business of settling international controversies without war, whether it be by negotiation or arbitration, essential conditions are reasonableness and good temper, a willingness to recognize facts and to weigh arguments which make against one's own country as well as those which make for one's own country; and it is very important that in every country the people whom negotiators represent and to whom arbitrators must return, shall be able to consider the controversy and judge the action of their representatives in this instructed and reasonable way.

One means to bring about this desirable condition is to increase the general public knowledge of international rights and duties and to promote a popular habit of reading and thinking about international affairs. The more clearly the people of a country understand their own international rights the less likely they are to take extreme and extravagant views of their rights and the less likely they are to be ready to fight for something to which they are not really entitled. The more clearly and universally the people of a country realize the international obligations and duties of their country, the less likely they will be to resent the just demands of other countries that those obligations and duties be observed. The more familiar the people of a country are with the rules and customs of self-restraint and courtesy between nations which long experience has shown to be indispensable for preserving the peace of the world, the greater will be the tendency to refrain from publicly discussing controversies with other countries in such a way as to hinder peaceful settlement by wounding sensibilities or arousing anger and prejudice on the other side.

In every civil community it is necessary to have courts to determine rights and officers to compel observance of the law; yet the true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others. The true basis of business is not the sheriff with a writ of execution; it is the voluntary observance of the rules and obligations of business life which are universally recognized as essential to business success. Just so while it is highly important to have controversies between nations settled by arbitration rather than by war, and the

growth of sentiment in favor of that peaceable method of settlement is one of the great advances in civilization to the credit of this generation; yet the true basis of peace among men is to be found in a just and considerate spirit among the people who rule our modern democracies, in their regard for the rights of other countries, and in their desire to be fair and kindly in the treatment of the subjects which give rise to international controversies.

Of course it cannot be expected that the whole body of any people will study international law; but a sufficient number can readily become sufficiently familiar with it to lead and form public opinion in every community in our country upon all important international questions as they arise.

For these reasons it seems to me that the influence of the new American Society of International Law and the publication of its Quarterly will be of practical benefit to the people of the United States; and I commend the Association and the Quarterly to the support of thoughtful men and women who wish to help in promoting the cause of international justice and peace.

ELIHU ROOT.

INTERNATIONAL RESPONSIBILITY TO CORPORATE BODIES FOR LIVES LOST BY OUTLAWRY

A novel case has recently arisen involving the liability of a foreign government to indemnify an American corporation (a missionary board) for the death of its employees by mob violence. The case grew out of the assault in 1905 of a mob of native Chinese upon the American Protestant Mission Station at Lienchou, province of Quantung, China, resulting in the death of four missionaries and one child.

The Chinese local authorities were exonerated by the surviving missionaries from any complicity with the rioters, prompt punishment by decapitation and imprisonment was inflicted on the leaders of the mob, and payment was made by the Chinese authorities for all the property losses sustained. The board, whose office is in New York City, announced to the churches of its denomination, on receipt of the news of the massacre, that

in no case whatever would the board receive indemnity for the beloved dead, nor would it accept indemnity of a punitive character, the board holding that the value of the blood of those who laid down their lives for Christ's sake should not be estimated in dollars and cents.

A notice of this action was sent by the board to the Chinese Minister in Washington, and by him communicated to his government at Peking and to the viceroy of the province in which the massacre occurred.

When the final payment on the property losses came to be made in the province, the viceroy was notified by the American consul that claims had been filed in the Department of State at Washington by relatives of the deceased missionaries for a large money compensation for their lives. The Chinese authorities, including the viceroy of the province and the minister in Washington, at once expressed their surprise at this claim, in view of the public announcement of the board, which was understood by them to be a voluntary waiver of all claims for loss of life. The answer of the board was that while the action of the relatives was a surprise to it, made without its knowledge or approval, in its announcement it did not purport to speak for the rela-

tives, over whom it had no control, and that it thereby only waived its own claim of indemnity for the loss of life of its missionaries, but that it would not be a party to any efforts to secure indemnity for the lives of the missionaries.

The foregoing action and views of the board were communicated by its secretary to the Department of State, and the department made the following reply:

As it is difficult to conceive upon what grounds the mission board could have based a claim so as to enable it to receive any benefit from any sums that might be paid on account of the murder of those people, your board's disclaimer would seem to have been meaningless. This, however, may not be understood by the Chinese government, and may tend to embarrass this government in its determination to demand damages from China for the unlawful killing of American citizens, which demand arises as a matter of public policy, irrespective of the associations which such citizens may have had with any missionary body, and irrespective of any views as to the desirability or propriety of such demand that may be held by third parties.

In this connection it may be well to notice the attitude of the government of the United States in the case of the loss of life of American citizens in foreign lands by mob violence and outlawry. For our present purpose it will suffice to examine the treatment of a few of such cases occurring in the neighboring republic of Mexico which, like China, has in the past been subject to considerable civil disorder. Taking them in chronological order: in 1868, John Braniff, an American citizen was killed by a band of robbers while at work on the Vera Cruz railroad. The American chargé reported to the Department of State that the Mexican government had given assurance that every possible effort would be made to detect and punish the guilty parties. Secretary Seward replied:

The engagement which the Mexican government has made to investigate the case, and its assurance that upon such investigation the government will direct what justice may require, is entirely satisfactory.¹

In 1874, Rev. David Watkins, a missionary of the American board of missions, was assassinated in one of the interior towns of Mexico by a body of some two hundred religious fanatics, his body horribly mutilated, and his house plundered. It was stated that the prison guard and the soldiers participated in the outrage. The Mexican

¹ U. S. Foreign Rel., 1868, p. 582.

government took prompt and energetic measures for the punishment of the guilty parties. On receipt of a report of the event, Secretary Fish wrote the American minister as follows:

This atrocious act appears to have created a marked sensation in this country. A prompt and thorough trial of the case, and the punishment of those found guilty according to law, will be expected. The immediate friends of the victims at least may expect that the Mexican government will indemnify his widow and children, should he have left either, for their loss, especially if any persons in the service of that government should have taken part in the murder, or should have neglected to adopt measures toward preventing it. Upon this point, however, the Department will give further instructions when the result of the judicial proceedings shall be known.

The action of the authorities resulted in the conviction of the leaders of the mob, five of whom were condemned to death, and a number of others were sentenced to terms of imprisonment. After some delay, necessitated by an appeal to the Federal Supreme Court, all the sentences were carried into effect. It does not appear that any demand for a money indemnity was ever made upon the Mexican government.²

Another religious riot occurred at Acapulco, Mexico, in 1875, in the assault upon a Presbyterian chapel which resulted in the killing of a number of native Protestants and one American citizen. In making reply to the report of the minister on the occurrence, Secretary Fish said:

Such an incident is not uncommon to propagandism in regions where the doctrines sought to be disseminated may be new and consequently more or less unpalatable. Martyrs must be expected at such times. It is much to be deplored that a citizen of the United States should have been one of the victims. The promptness and energy with which you applied to the Mexican government in the matter, are to be commended. There is cause to fear, however, that we cannot judiciously require from them a pecuniary compensation for the relief of the wife and children of the murdered man, unless we can show that the killing was occasioned by an act or omission of a person in authority at Acapulco. Governments are not usually accountable in pecuniary damages for homicide by individuals. All that can fairly be expected of them is that they should in good faith, to the extent of their power, prosecute the offenders according to law.³

The consul at Acapulco reported that public sentiment was so strongly on the side of the rioters that the judicial authorities failed

² For. Rel., 1874, pp. 734, 737; 1876, p. 386.

³ 6 Moore's Int. Law Digest, 815.

to act, and no punishment followed the outrage. Neither did the government of the United States see proper to make any pecuniary demand for the life of the murdered American citizen. A number of other cases might be cited where American citizens have lost their lives by outlaws, without any compensation being demanded or obtained. In one of those cases, Secretary Gresham, in reply to an application by relatives for an indemnity, said:

The Mexican authorities promptly apprehended the murderers, and the Department understands that they were tried, convicted, and punished. Under these circumstances it is not believed that any claim for damages could be maintained.⁴

The case of Baldwin was of a somewhat different character. He was murdered in Mexico in 1887 by two well-known bandit leaders, who had committed other murders, including a Mexican official of the locality. Ten days after Baldwin's murder, the inhabitants of the district pursued and killed five of the bandits, including the two murderers of Baldwin. The government of the United States made a demand on behalf of the widow for pecuniary damages, on the ground that the Mexican government was negligent in not suppressing the outlawry which had become notorious and in failing to punish the bandits. The latter government cited the attitude of the United States respecting the New Orleans and Chinese riots, and insisted that American citizens in Mexico could only claim the same measure of protection that was extended to natives. The discussion continued through several years. In 1892 it was suggested that, in view of the dependent situation of the widow and of the action of the United States in similar disputed cases as to responsibility, a settlement might be reached without prejudgment on the legal aspects of the claim. Whereupon, Mexico in 1894, paid to the United States for the benefit of the widow, \$20,000, the payment being made and accepted

as a matter of simple equity, without implying any admission that in the case in question the Mexican government was, strictly speaking, responsible, and that it is not to constitute a precedent for the future treatment of similar cases; and President Cleveland referred to it in his message to Congress as "a gracious act" on the part of Mexico.⁵

No case has been found where the United States has assumed the presentation of a pecuniary claim of a mission board or other corpor-

⁴ 6 Moore's Digest, 806.

⁵ 6 Moore's Digest, 801.

ation for the life of one of its employees through the neglect or want of due protection of a foreign government. The Mexican cases cited are valuable as showing that, even conceding the claim of a pecuniary interest of a mission board in its employees, there was in the Lienchou, China, affair no basis upon which the board in question could found a claim for the lives lost, because it was not shown (to use the language of Secretary Fish), "that the killing was occasioned by an act or omission of a person in authority," and (in the language of Secretary Gresham), "the authorities promptly apprehended the murderers, and * * * they were tried, convicted and punished."

More than a year after the Lienchou riot, and upon a full examination of the questions involved, the following conclusion was announced:

The board holds that whatever may be the legal technicalities involved, it has large financial interests in the missionaries whom it sends out and upon whom its work depends, that the murder of those missionaries involves the board in heavy financial loss, and that if the board should elect to demand indemnity for such loss, our government should recognize the equity of its contention. The board voluntarily waived its claim in the case of the massacre at Lienchou, but it insists that in doing so it waived a right which it could have justly insisted upon.

Let us examine this position a little more fully. The board in question owes its legal existence to the incorporation acts of the State of New York. Under the common law the death of a human being is not the ground of an action for damages, and no compensation therefor or for any resulting loss is recoverable.⁶ This rule of law, however, has been modified in most of the states of the Union, including New York, by statutory enactments, but these acts are to be strictly construed. The Code of Civil Procedure of the State of New York authorizes a suit to be maintained for the benefit of a husband, wife or next of kin, to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused; the damages received are exclusively for the benefit of the husband, wife or next of kin; and the damages are to be awarded on a fair and just compensation for the pecuniary injuries resulting to the person for whose benefit the action is brought.⁷

It must be clear that a mission board or other corporate body, deriving its authority from the state of New York, cannot maintain an

⁶ 4 Sutherland on Damages, chap. 37, ed. 1903; 2 Sedgwick on Damages, chap. 18, ed. 1891.

⁷ New York Code of Civil Procedure, §§ 1902, 3 and 4.

action in that state for damages resulting from the death of one of its employees by the wrongful act, neglect, or default of any party or authority whatsoever. It is difficult to understand how a board or corporation, which is thus incapacitated in its own domicile, can acquire a right to maintain a claim for such damages before its own federal government.

If it possesses such right it must be found, as in this case, against China, in the rules or practice of international law. I have already stated that I have found no instance where the government of the United States has ever presented to a foreign government the claim of an American board or corporation for its own benefit based upon the wrongful death of one of its employees. Fortunately for the solution of this question, an occasion has arisen requiring its determination by an international body of no insignificant authority.

As is well known, the Boxer uprising in China of 1900 resulted in the murder of quite a number of missionaries. Several of these were employees of the board whose claim we are now examining. It would seem to be an occasion, if ever, when the church boards would be justified in setting up their own corporate claim for damages. The Chinese government had been so far in complicity with the perpetrators of those bloody deeds, that the foreign governments felt it necessary to send their armies to seize the capital and inflict exemplary punishment for the wrongs and injuries suffered by their citizens and subjects. The diplomatic representatives of eleven nations, including the United States, after determining the total amount of the indemnities to be required of China, drew up a statement of the rules which should govern the distribution of those indemnities. Under those rules societies and companies were allowed to make claims for damages, for property losses, for buildings, and the like, damaged or destroyed; but indemnities for wounds, cruel treatment, or death, were confined to private individuals, to widows and orphans.⁸

The demands of the foreign governments went to the extreme limit of indemnity in the Boxer outbreak, and in that instance societies or incorporated bodies were excluded from indemnities for injuries to persons or for lives lost. It is not alleged that the board in question ever presented to the Department of State a claim for the loss of its

⁸ Appendix to For. Rel., 1901, Mr. Rockhill's Report, 106.

employees in that outbreak or protested against the rules of the diplomatic body.

It is stated that the action of the board, setting forth its position, as above quoted, was submitted to the leading Protestant mission boards domiciled in New York, and that they unanimously concurred in its position. Whether such action was wise or Christlike is not a legal question, and I abstain from expressing an opinion upon it.

JOHN W. FOSTER.

INTERNATIONAL LAW: ITS PRESENT AND FUTURE

In entering upon the publication of a new journal, professedly designed not only to advance the knowledge of, but also to improve, the principles of international law, it is not inappropriate to make an estimate of the present state of the system and to consider its future needs.

There are two modes in which international law may be developed. The first is the general and gradual transformation of international opinion and practice; the second is the specific adoption of a rule of action by an act in its nature legislative. The operation of the former mode is often difficult to follow in its details, but its effects are potent and undeniable. Perhaps its clearest and most precise application may be found in the opinion of the Supreme Court of the United States in the case of the Spanish fishing-smacks, the *Paquete Habana* and the *Lola*,¹ which were seized by American cruisers during the war between the United States and Spain, with a view to their confiscation as enemy's property. The Supreme Court, however, held that they were not subject to condemnation, on the ground that coast fishing vessels, unarmed and honestly pursuing the peaceful calling of catching and bringing in fresh fish, were exempt from capture as prize of war. In reaching this conclusion, the court considered the question whether the exemption was merely a matter of "comity," or whether it was a matter of legal right to which the court was bound to give effect. In behalf of those who sought the condemnation of the vessels, authority dating back nearly a hundred years, was cited, to the effect that the exemption was only a matter of "comity;" but the court, pointing to later practice, declared that the period of a hundred years was "amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law." And the court quoted a statement of Sir James Mackintosh to the

¹ The *Paquete Habana*, 175 U. S. 677.

effect that as mitigations of the rules of war "received the sanction of time," they were "raised from the rank of mere usage" and became "part of the law of nations."

It would not be difficult to cite other illustrations of the recent development of international rules of conduct by the gradual transformation of opinion and practice. But the past century has been specially distinguished by the modification and improvement of international law by what may be called acts of international legislation. By the congress of Vienna, in 1815, rules were adopted, the effect of which has been world-wide, with regard to the navigation of international rivers. By the same congress and the congress of Aix-la-Chapelle, the grades of diplomatic representation were established. Yet more remarkable as an act of legislative aspect was the declaration on maritime law made by the congress of Paris of 1856. Three out of the four rules embraced in the declaration are now universally acknowledged as rules of international, either by virtue of adhesion to the declaration or by independent recognition and acceptance. Of the congress at the Hague, in 1899, it is unnecessary to speak. It forms an epoch in the history of the law of nations.

What has been said as to the development of international law, denotes the progress at the same time the defects of the system. Its progress has been great; but, viewed as a body of law, its chief defect is the want of some form of international organization by which a common interpretation and common enforcement of its mandates may be secured. To a certain extent its rules are at present administered by the courts of each country, but the efficacy of this judicial administration is qualified by two facts: first, that much of what we call international law is of political rather than judicial cognizance and cannot be dealt with by the courts; and secondly, that, if the court of a particular country departs from the general opinion, there is no remedy but a diplomatic claim, enforceable in the last analysis by war.

Here, then, lies the work of the future, in the attainment of some method, by some form of organization, for the common interpretation and enforcement of international law, not indeed without the use or provision for the use of force, but without creating the legal condition of things called a state of war.

JOHN BASSETT MOORE.

DOCTOR FRANCIS LIEBER'S INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES IN THE FIELD¹

International law owes much to American judges and to American jurists. The list of those who have contributed to its advancement is not short and includes the names of Marshall, Story and Field, Kent, Wheaton, with his able commentators, Dana and Lawrence, Halleck and Lieber and, among recent writers, Taylor, Moore and Snow. Although his name is not connected with a general treatise on the subject of public international law, it may be doubted whether any of his fellow-workers in that field have rendered a more important service to humanity and to international good neighborhood, than has Dr. Francis Lieber in his memorable "Instructions for the Government of the Armies of the United States in the Field."

The facts of his life and public career are too well known to require presentation. His patriotic service in the Colberg Regiment under Blücher during the campaign which completed the overthrow of the Emperor Napoleon, his serious wounding at Namur in the pursuit of the remnant of the imperial armies in their flight from Waterloo, his early identification with the cause of German liberalism, his brief service in the war for Greek independence, were all included between the years 1815 and 1826, when he found asylum in England as a political refugee. After a brief residence in London, Dr. Lieber crossed to the United States and established himself in Boston and subsequently in Columbia, South Carolina, where, in the congenial field of activity which was afforded him in a professorship in the University of South Carolina, the greater portion of his useful life was passed.

His devotion to the Union cause led to the resignation of his professorship, but placed at the service of President Lincoln a trained

¹ The full text of the Instructions will be found in vol. ii of Lieber's *Miscellaneous Writings*—Lippincott, Philadelphia, 1881; and in General Orders No. 100, Adjutant General's Office of 1863.

intelligence of which the government in Washington was not slow in making use.

It has been truly said of England and the United States that they were warlike but not military nations, and it is not surprising that the outbreak of the great Civil War should have found the armies of both contestants but poorly equipped in the technical knowledge of the rights and duties of belligerents which were so essential to a humane and vigorous prosecution of the war. As the newly raised regiments which had been concentrated in the vicinity of Washington crossed the Potomac and established a military occupation in the territory of Virginia, many acts of vandalism were committed and such of their commanders as were versed in the usages of war found abundant opportunity for the application of their knowledge to the distressing conditions which confronted them in the steadily broadening zone of military operations.

An incident which occurred as the Virginia campaign of 1862 was drawing to a close, illustrates the want of training on the part of officers who, for a year or more, had exercised important regimental commands in the theatre of military activity in Northern Virginia. A colonel of volunteers who had been mortally wounded in one of the engagements beyond Centerville, an officer of gallantry and of unusual capacity as a regimental commander, said to a comrade: "I die a victim to Pope's incapacity and McDowell's treason." General McDowell, a strict disciplinarian and an officer of proved loyalty and devotion, who commanded the first troops who entered Virginia territory in 1862, had given strict orders forbidding the taking of private property in the enemy's country; he had also forbidden indiscriminate firing upon the outposts of the enemy. He had given reasons for his action in each case, and had simply undertaken to enforce some of the fundamental rules of war, but had only succeeded in impressing an intelligent subordinate, unskilled in the usages of war, that in protecting helpless non-combatants, and in forbidding the unnecessary killing of outposts that he had been guilty of treasonable acts.

The assignment of Major General Halleck, himself a profound student of international law, to the chief command of the Union Army in 1862, led to a more general and regular enforcement of the laws and usages of war than had been the case prior to his accession to command. The engrossing character of his duties as the commander-in-chief of

the armies in the field, however, prevented him from giving his personal attention to the preparation of instructions regulating the conduct of military operations, and the government of the considerable areas of territory which had come into federal occupation as a consequence of the military operations of the advancing armies, and in the emergency, Doctor Lieber's name was fortunately suggested as one well fitted by his training and attainments to serve the government in the preparation of a compilation of rules and usages of war.

His peculiar fitness for the task was well known to President Lincoln and to those to whom he was accustomed to look for advice in perplexing questions of this kind, as he had prepared, at the instance of the government, in the summer of 1862, a report on the general subject of guerrilla and partisan operations. In this paper the subject is so clearly and exhaustively treated as to warrant a brief citation.

In speaking of the operations of bodies of partisans in previous wars, he says:

The position of armed parties loosely attached to the main body of the army, or altogether unconnected with it, has rarely been taken up by writers on the law of war. The term guerrilla is often inaccurately used, and its application has been particularly confused at the present time. From these circumstances arises much of the difficulty which presents itself to the publicist and martial jurist in treating of guerrilla parties. (Lieber's Miscellaneous Writings, vol. ii, p. 277.)

He then goes on to say:

The term guerrilla is the diminutive of the Spanish word *guerra*, war, and means petty war, that is, war carried on by detached parties; generally in the mountains. It means, further, the party of men united under one chief engaged in petty war, which, in the eastern portion of Europe and the whole Levant, is called a *capitanery*, a band under one capitano. The term *guerrilla*, however, is not applied in Spain to a single man of the party; such a person is called *guerrillero*, or more frequently *partida*, which means partisan. Thus, Napier, in speaking of the guerrilla, in his History of the Peninsular War, uses, with rare exception, the term *partidas* for the chiefs and men engaged in the petty war against the French. It is worthy of notice that the dictionary of the Spanish academy gives, as the first meaning of the word *guerrilla*: "A party of light troops for reconnoissance, and opening the first skirmishes." * * * What, then, do we in the present time understand by the word guerrilla? In order to ascertain the law or to settle it according to elements already existing, it will be necessary ultimately to give a distinct definition; but it may be stated here that whatever may be our final definition,

it is universally understood in this country, at the present time, that a guerrilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a *regular* war. The irregularity of the guerrilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering; it consists in its disconnection with the army, as to its pay, provision, and movements, and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time. These are, I believe, constituent ideas of the term guerrilla as now used. Other ideas are associated with the term, differently by different persons. Thus, many persons associate the idea of pillage with the guerrilla band, because, not being connected with the regular army, the men cannot provide for themselves, except by pillage, even in their own country; acts of violence with which the Spanish guerrilleros sorely afflicted their own countrymen in the Peninsular War. Others connect with it the idea of intentional destruction for the sake of destruction, because the guerrilla chief cannot aim at any strategic advantages or any regular fruits of victory. Others, again, associate with it the idea of the danger with which the spy surrounds us, because, he that today passes you in the garb and mien of a peaceful citizen, may tomorrow, as a guerrilla-man, fire your house or murder you from behind the hedge. Others connect with the guerrillero the idea of necessitated murder, because guerrilla bands cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners, and of course have been killed in turn when made prisoners, thus introducing a system of barbarity which becomes intenser in its demoralization as it spreads and is prolonged. Others, again, connect the ideas of general and heinous criminality, of robbery and lust with the term, because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced, and where no discipline is enforced in war a state of things results which resembles far more the wars recorded in Froissart or Comines, or the Thirty Years' War, and the Religious War in France, than the regular wars of modern times. And such a state of things results speedily, too; for all growth, progress, and rearing, moral or material, are slow; all destruction, relapse, and degeneracy fearfully rapid. It requires the power of the Almighty and a whole century to grow an oak tree; but only a pair of arms, an axe, and an hour or two to cut it down.

History confirms these associations, but the law of war as well as the law of peace has treated many of these and kindred subjects—acts justifiable, offensive, or criminal—under acknowledged terms, namely: the freebooter, the marauder, the brigand, the partisan, the free-corps, the spy, the rebel, the conspirator, the robber, and especially the highway robber, the rising *en masse*, or the arming of peasants. * * * It is different, if we understand by guerrilla parties, self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid

at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will, therefore, generally give no quarter.

They are peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands. The Spanish guerrilla bands against Napoleon proved a scourge to their own countrymen, and became efficient for their own cause only in the same degree in which they gradually became disciplined. The royalists in the north of France, during the first revolution, although setting out with sentiments of loyal devotion to their unfortunate king, soon degenerated into bands of robbers, while many robbers either joined them or assumed the name of royalists. Napoleon states that their brigandage gave much trouble, and obliged the government to resort to the severest measures. * * *

But when guerrilla parties aid the main army of a belligerent, it will be difficult for the captor of guerrilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government; and it would seem that we are borne out by the conduct of the most humane belligerents in recent times, and by many of the modern writers, if the rule be laid down, that guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of open places, are proved upon them; leaving the question of self-constitution unexamined.

The law of war, however, would not extend a similar favor to small bodies of armed country people, near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits, and to brigandage. The law of war would still less favor them when they trespass with the hostile lines to commit devastation, rapine, or destruction. Every European army has treated such persons, and it seems to me would continue, even in the improved state of the present usages of war, to treat them as brigands, whatever prudential mercy might decide upon in single cases. This latter consideration cannot be discussed here; it does not appertain to the law of war.

It has been stated already, that the armed prowler, the so-called bush-whacker, is a simple assassin, and will thus always be considered by soldier and citizen; and we have likewise seen that the armed bands that rise in a district fairly occupied by military force, or in the rear of an army, are universally considered, if captured, brigands, and not prisoners of war. They unite the fourfold character of the spy, the brigand, the assassin, and the rebel, and cannot—indeed, it must be supposed, will not—expect to be treated as a fair enemy of the regular war. They know what a hazardous career they enter upon when they take up arms, and that, were the case reversed, they would surely not grant the privileges of regular warfare to persons who should thus rise in their rear.

In conclusion, he says:

I have thus endeavored to ascertain what may be considered the law of war, or fair rules of action toward so-called guerrilla parties. I do not enter upon a consideration of their application to the civil war in which we are engaged, nor of the remarkable claims recently set up by our enemies, demanding us to act according to certain rules which they have signally and officially disregarded towards us. I have simply proposed to myself to find a certain portion of the law of war. The application of the laws and usages of war to wars of insurrection or rebellion is always undefined, and depends upon relaxations of the municipal law, suggested by humanity or necessitated by the numbers engaged in the insurrection. The law of war, as acknowledged between independent belligerents, is, at times, not allowed to interfere with the municipal law of rebellion, or is allowed to do so only very partially, as was the case in Great Britain during the Stuart rebellion, in the middle of last century; at other times, again, measures are adopted in rebellions, by the victorious party or the legitimate government, more lenient even than the international law of war. Neither of these topics can occupy us here, nor does the letter prefixed to this tract contain the request that I should do so. How far rules which have formed themselves in the course of time between belligerents might be relaxed, with safety, towards the evil-doers in our civil war, or how far such relaxation or mitigation would be likely to produce a beneficial effect upon an enemy who is committing a great and bewildering wrong; seems to have withdrawn himself from the common influences of fairness, sympathy, truth, and logic—how far this ought to be done, at the present moment, must be decided by the executive power, civil and military, or possibly by the legislative power. It is not for me, in this place, to make the inquiry. So much is certain, that no army, no society, engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation, without the deepest injury to itself and disastrous consequences, which might change the very issue of the war.

I feel safe in saying that the works of text writers on international law may be searched in vain for a more lucid presentation of any of the well-understood usages of war than is shown in Dr. Lieber's useful and interesting and exhaustive description of guerrilla warfare which appears in the second volume of his published works. It is not surprising that he was selected to attempt the hitherto untried task of formulating the rules and usages in accordance with which the operations of the armies of the United States should be conducted.

The propriety of entrusting the task to Doctor Lieber seems to have been fully determined upon in December, 1862, when the selection of a board for that purpose was announced in the following order:

WAR DEPARTMENT, *Adjutant General's Office.*

WASHINGTON, December 17, 1862.

Special Orders, No. 399.

EXTRACT.

* * * * *

5. Francis Lieber, LL.D.,

Major General E. A. Hitchcock, U. S. Volunteers,

Major General G. Cadwalader, U. S. Volunteers,

Major General George L. Hartsuff, U. S. Volunteers, and

Brigadier General J. H. Martindale, U. S. Volunteers,

will constitute a Board to propose amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war.

The Board will meet in the City of Washington at such times as the members may agree upon.

* * * * *

By order of the Secretary of War,

E. D. TOWNSEND,

Assistant Adjutant General.

I have been unable to find that the general officers who were associated with Doctor Lieber were actively employed in the work of verification or compilation, though the rough drafts of his articles were doubtless submitted to them as they were tentatively completed; it is certain, however, that their expert advice in matters connected with the conduct of military operations was gladly received and gratefully acknowledged; he seems also to have been in close contact with General Halleck during the entire period. The order of appointment contemplated a revision of the articles of war, a portion of the statute law of the United States, and it is highly probable that the military members of the commission were engaged in a study of that portion of the work, leaving the broad field of the rules and usages of war to their competent chairman. That the work was largely, if not chiefly prepared by Doctor Lieber, is indicated by his letter to General Halleck, in which, writing from New York under date of February 20, 1863, he says:

MY DEAR GENERAL:

Here is the *projet* of the code I was charged with drawing up. I am going to send fifty copies to General Hitchcock for distribution, and I earnestly ask for suggestions and amendments. I am going to send for that purpose a copy to General Scott, and another to Hon. Horace Binney. For two or three paragraphs you will observe that we should

want the assistance of Congress. That is now too late; but we suggest to you to decide with the Secretary of War whether it would be advisable and feasible to send the code even now, and as it is, to our generals, to be a guide on some difficult and important points. I observe from some orders of General Rosecrans that he has used my pamphlet on "Guerilla Warfare," unless there be a remarkable spontaneous coincidence. * * * I do not believe that it will be possible to change for the present war, or at least immediately, the usage which has grown up regarding paroling privates, but you will agree with me that the law, as I have laid it down, is the law and usage. As paroling is now handled by us, it amounts to a premium on cowardice, *e.g.*, in the affair of Harper's Ferry. * * * You are one of those from whom I most desire suggestions, because you will read the code as lawyer and as commander. Even your general opinion of the whole is important to me. I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well-read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no ground-work, no text-book. I can assure you, as a friend, that no counselor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization have been my guides; but of course the whole must be still very imperfect. * * * Ought I to add anything on a belligerent's using, in battle, the colors and uniform of his opponent? I believe when this has been done no quarter has been given. I have said nothing on rebellion and invasion of our country with reference to the treatment of our own citizens by the commanding general. I have three paragraphs on this subject, but it does not fall within the limits, as indicated in the special order appointing our board. * * *

The code was submitted to General Halleck and was approved by him, with one or two unimportant changes, and was formally adopted by the President and published to the army in General Orders No. 100 of 1863. In acknowledging the receipt of a copy of his completed work, Doctor Lieber writes to General Halleck on May 20, 1863:

MY DEAR GENERAL:

I have the copy of General Orders 100 which you sent me. The generals of the board have added some valuable parts; but there have also been a few things omitted, which I regret. As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as basis for similar works by the English, French and Germans. It is a contribution by the United States to the stock of common civilization. I feel almost sad in closing this business. Let me hope it will not put a stop to our correspondence. I regret that your name is not visibly connected with this code. *You* do not regret it, because you are void of ambition, to a faulty degree, as it seems to me. * * * I believe it is now

time for you to issue a *strong* order, directing attention to those paragraphs in the code which prohibit devastation, demolition of private property, etc. I know by letters from the West and the South, written by men on our side, that the wanton destruction of property by our men is alarming. It does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult. Your order, though impressive and even sharp, might be written with reference to the code, and pointing out the disastrous consequences to reckless devastation, in such a manner as not to furnish our reckless enemy with new arguments for his savagery. * * *

That there was no remission in Doctor Lieber's interest in the great work which he had carried to successful completion, is indicated by a subsequent letter to General Halleck on the subject of certain retaliatory measures that had been ordered by General Burnside in the field of activity to which he had been assigned in East Tennessee:

* * * Is the threat of General Burnside true, that he would hang ten Confederate officers for every Union officer hung by the Confederates? Whether true or not, you are aware that this is the spirit which generally shows itself when a barbarous outrage is committed, but which it is very necessary promptly to stop. The wanton insolence of our enemy has been growing so fast, and is so provoking, that I am plainly and simply for quick and stern retaliation; but in retaliation it is necessary strictly to adhere to sections twenty-seven and twenty-eight of General Order 100, to the elementary principle which prevails all the world over—*tit for tat*, or eye for eye—and not to adopt ten eyes for one eye. If one belligerent hangs ten men for one, the other will hang ten times ten for the ten; and what a dreadful geometrical progression of skulls and cross-bones we should have. * * * You will decide what the general-in-chief has to do in this matter. Some distinct expression of the essential character of retaliation, whether by general order or by a proclamation of the President (intended for our side as well as for the other), or by a general letter of yours addressed to all generals, I do not presume to decide. * * * President King read yesterday to me a letter from Mr. Lawrence, in which he informs him that Brockhaus in Leipzig has made him a very liberal offer to publish in Germany a French translation of Lawrence's new edition of Wheaton. So we shall have a European edition of this secessionized *American Law of Nations*. It worries me. These two large volumes in French will be the universal authority in Europe concerning us. * * * A first-rate work should be written as an antidote; but it would require a long time of absolute leisure for a great jurist—as Halleck, if he had not the sword in his hand, taking Heffter as his basis, as Lawrence takes Wheaton. * * *

The rules so prepared and adapted were distributed to the armies in the field and were rigorously and intelligently enforced during the remainder of the war. After actual hostilities had ceased and occupy-

ing governments had been established in the states which had participated in the rebellion, the requirements of the order constituted a safe and reliable guide for the administration of the governments established by the United States in the occupied territory. Indeed, Congress, in what were known as the "Reconstruction Acts," vested the execution of its legislative policy in that regard in the military governments so established, and charged their military commanders with the execution of the successive steps prescribed by law as a condition precedent to the reestablishment of the seceded states in their constitutional relations with the Federal government. Doctor Lieber's rules were also adopted by the German government with a view to regulating the conduct of its armies in the field during the war of 1870; and it is said to have worked so successfully that but a single case arose, during the prosecution of the war, to which its principles did not apply.

But the usefulness of Doctor Lieber's work did not end here. In 1874, an international conference was invited by the Emperor Alexander II. to meet at Brussels for the purpose of discussing the practicability of framing an acceptable code or compilation of the laws of war on land. Professor Bluntschli, whose efforts to codify the law of nations are too well known to require particular mention, was charged, as chairman of the committee on codification, with the preparation of a draft of the proposed compilation of the recognized rules and usages of war. In the performance of this duty, his chief reliance was the admirable codification which had been prepared by Doctor Lieber for the use of the government of the United States, so that the Brussels code bears in every article a distinct impression of the Instructions for the Government of Armies, prepared eleven years before, by his lifelong friend and co-worker.

The character and importance of Doctor Lieber's work are well summarized by his old friend, Professor Bluntschli of Heidelberg, in the brief but appreciative biographical sketch which appears as a preface to the second volume of his *Miscellaneous Writings*:

The Instructions for the Government of Armies of the United States in the Field were drawn up by Professor Francis Lieber at the instance of President Lincoln, and formed the first codification of International Articles of War (*Kriegsvölkerrecht*). This was a deed of great moment in the history of international law and of civilization. Throughout this

work, also, we see the stamp of Lieber's peculiar genius. His legal injunctions rest upon the foundation of moral precepts. The former are not always sharply distinguished from moral injunctions, but nevertheless, through a union with the same, are ennobled and exalted. Everywhere reigns in this body of law the spirit of humanity, which spirit recognizes as fellow-beings, with lawful rights, our very enemies, and which forbids our visiting upon them unnecessary injury, cruelty, or destruction. But at the same time, our legislator remains fully aware that, in time of war, it is absolutely necessary to provide for the safety of armies and for the successful conduct of a campaign; that, to those engaged in it, the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored.

These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which should express the present state of the legal consciousness of civilized peoples. Lieber, in his correspondence with me, had strongly urged that I should do this, and he lent me continual encouragement.

The part played by the Brussels code in the preparation of the rules of the Hague conference for the conduct of war on land is very clearly set forth in the explanatory remark of M. de Martens, the Russian representative at the conference, at the opening of the sessions, to the committee charged with the preparation of the rules concerning the laws and usages of war on land:

The object of the imperial government has steadily been the same, namely, to see that the declaration of Brussels, revised so far as this conference may deem it necessary, should form the solid basis for the instructions which the governments should hereafter, in case of war, issue to their armies on land. Without doubt, to the end that this basis should be firmly established, it is necessary to have a treaty engagement similar to that of the Declaration of St. Petersburg in 1868. It will be necessary that in a solemn article the signatory powers, who signify their adherence, should declare that they are in accord on the subject of uniform rules, which should be embodied in these instructions. This is the only manner of obtaining an obligation binding upon the signatory powers. It will be well understood that the Declaration of Brussels shall have no obligatory force except for the signatory states which declare their adherence. (Holls: *The Peace Conference at the Hague*, p. 135.)

Although the subject matter of Doctor Lieber's rules has constituted the substantial framework of the several codifications that have been attempted, from time to time, since their adoption in 1863, they

have not diminished in importance nor have their vigor or usefulness been materially impaired. The war which existed at the date of their promulgation was strictly *internal* in character; and, although the belligerency of the states in rebellion had been recognized by the Federal government, the character of the contest, in many of its aspects, differed materially from *an external* war, in which the belligerent parties were independent states.

The war policy of the United States toward the insurrectionary forces was, in the main, in accordance with the laws of war, as those laws were then accepted and understood. Its enemies, however, were its own citizens, who, for the time, denied its sovereign authority, and refused obedience to its laws. Its right to suppress the rebellion, and its right to choose its method of doing so, were alike beyond dispute. In the exercise of this right it was at perfect liberty to choose any policy between the methods provided by its municipal laws, on the one hand, and those provided by the law of nations on the other.

As a matter of fact it chose a war policy lying between the extremes above indicated. General operations in the field were carried on in accordance with the laws of war. In its treatment of the property of individuals in rebellion, in its views of occupation and of occupied territory, and in its policy toward the residents of such occupied territory, it pursued a course which it deemed best suited to the task upon which it was then engaged—the suppression of a rebellion against its authority. They will, therefore, continue to have value as a rule of conduct in internal wars in which it is attempted by a portion of the population of a state to throw off their allegiance to the parent government.

Subsequent codes are characterized by a certain vagueness and want of positiveness of statement which is calculated to seriously impair their usefulness when it is attempted to apply them to the practical operations of warfare on land. They are also objectionable in vesting too broad a discretion in the generals who exercise chief command of occupying armies. Colonel Birkhimer, in his *Military Government and Martial Law*, says, with very great truth:

The Instructions were adopted in the midst of a great war, the result of which none could foresee. Before being adopted they were examined by a board of eminent military officers who not only understood what the laws of war were theoretically, but from experience in the field

knew their applicability and how they were to be carried into execution. Moreover, they were adopted under grave official responsibility, the officers who sanctioned having to use them during the continuance of the war as their rule of conduct in dealing with the enemy. Examination will evince that they bear the deep impress of this official responsibility. The justness of this statement is not impaired by the fact that the Instructions were adopted precisely as submitted to the board; this circumstance only furnishes additional evidence of the thoroughness with which they had been prepared. While they attempt to put into official shape the humanity of the land, they do not deprive a belligerent of all fair and reasonable means of successfully carrying on war. His hands are not tied by theories regarding the right of the other party belligerent, or of the inhabitants of territory militarily occupied. Yet throughout it is inculcated that the law of war imposes many restrictions on the modes formerly adopted to injure the enemy, based on principles of justice, faith, and honor. It may be confidently affirmed that the Instructions form a convenient and useful code of the essential laws of war on land; and, imbued as they are with the milder precepts of modern warfare, they may be expected successfully to withstand the mutations of time until at least the present moral sense of man has taken a long step in advance. The prediction is here ventured that they will continue to be the rule of hostile nations when criminations and recriminations are being indulged because of infractions to these later codes. To attempt by such agreements unreasonably to restrain the actions of a belligerent regarding coercive measures to be used against the enemy is only to invite their utter disregard when nations join in deadly strife.

On the other hand, the Brussels code, and also that agreed upon in 1880 by the Institut de droit International, which has been published to the world as the best modern thought on this subject, has the disadvantage of being adopted in times of peace, when the minds of men in dealing with military affairs turn rather to the ideal than the practical. It is not meant by this to disparage the learning, ability, and zeal of those who digested these codes. In this they stood preëminent before the world, and some were soldiers of great experience. The proceedings of these learned bodies show, however, that the propositions of each state were in greater or less degree generally rejected by the others as inadmissible, and the final result, particularly in the Brussels conference, was a compromise between conflicting interests. They may be expected to share the fate of compromises, generally, which are without a binding sanction—be broken at the convenience of the parties. The great powers at once divided upon the Brussels code. And here it may be observed that these powers alone are of real importance when an international code is to be adopted; if they do not make, they unmake them; yet in all conventions and conferences having in view the adoption of such codes, the smaller states are conspicuous by the part they take in their deliberations and published conclusions.

GEORGE B. DAVIS.

THE CALVO AND DRAGO DOCTRINES

Among the subjects scheduled for discussion at the third Pan-American conference, which met at Rio de Janeiro during July and August, 1906, was a resolution that the second peace conference at the Hague be requested to

consider whether and, if at all, to what extent, the use of force for the collection of public debts is admissible.

There seems to have been some objection to the resolution in this form on the ground that such action

would arouse the distrust of European capitalists and thus affect unfavorably the credit of Central and South American countries.¹

But a resolution was finally agreed upon on August 22, and unanimously adopted, which provided that the conference recommend to the governments represented that they

consider the advisability of inviting the second peace conference at the Hague to examine the question of the compulsory collection of public debts, and, in general, the best means tending to diminish among nations conflicts of purely pecuniary origin.²

It will be seen that the resolution in its final form, while in nowise binding upon the governments represented at the conference, recommends a consideration not only of the narrower Drago Doctrine, which merely forbids the forcible collection of public debts, but that it points to the broader Calvo Doctrine³ which absolutely condemns diplomatic as well as armed intervention⁴ as legitimate methods of

¹ L. S. Rowe in the *Independent* for October 5, 1906. Dr. Rowe adds: "This feeling was strengthened by the fact that, prior to the meeting of the conference, the European press had exploited to the utmost the dangers incident to the enunciation of any such doctrine."

² From President Roosevelt's recent message to Congress of December 4, 1906.

³ Of course there is no express or implied endorsement of the Calvo Doctrine contained in the above resolution. But in view of political and economic conditions and the teachings of publicists coupled with those of experience, there can be little question as to the state of public opinion on this subject in Latin America.

⁴ Calvo does not distinguish between armed and diplomatic or pacific intervention except as a matter of form. He condemns the latter as well as the former. See *Le Droit International* (5th ed.), i, §110, p. 267.

enforcing any or all private claims of a purely pecuniary nature, at least such as are based upon contract or are the result of civil war, insurrection or mob violence.

In his discussion of the important and complicated subject of intervention in the first volume of *Le Droit International*,⁵ Calvo claims that European nations have followed a different rule or principle of intervention in their dealings with American states from that which has governed their relations with each other. He points out that during the greater part of the nineteenth century at least, intervention in Europe always rested upon some important principle of internal politics, such as the balance of power, or upon some great moral or religious interest favorable to the development of civilization; while in the new world the interventions of European states have rested upon no legitimate principles, being based upon mere force and a failure to recognize the complete freedom and independence of American states. This, he explains, is due to the traditions of the colonial system.

Aside from political motives these interventions have nearly always had as apparent pretexts, injuries to private interests, claims and demands for pecuniary indemnities in behalf of subjects or even foreigners, the protection of whom was for the most part in nowise justified in strict law. * * * According to strict international right, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with nations in the new world.⁶

In that portion of his work, entitled *Mutual Duties of States*,⁷ Calvo denies categorically that a government is responsible for any losses or injuries sustained by foreigners in time of internal troubles or civil war.

To admit in such cases the responsibility of governments, *i. e.*, the principle of indemnity, would be to create an exorbitant and fatal privilege essentially favorable to powerful states and injurious to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners.

⁵ *T. i, liv, iii.* See especially §§185-206.

⁶ *Op. cit.*, §205, pp. 350-351.

⁷ *T. iii, liv, xv.*

In sanctioning such a doctrine one would, he says, be guilty of a deep, although indirect, attack upon one of the fundamental elements of the independence of nations, viz: that of territorial jurisdiction. He adds:

Herein lies, in effect, the real significance of this frequent recourse [on the part of European governments] to the diplomatic channel for settling disputes which by their nature and surrounding circumstances belong to the exclusive domain of the ordinary courts.⁸

After citing a number of opinions of statesmen and examples drawn from the general practice of nations,⁹ Calvo restates his doctrine and presents the following conclusions:

1 The principle of indemnity and diplomatic intervention in behalf of foreigners for injuries suffered in cases of civil war has not been admitted by any nation of Europe and America.

2 The governments of powerful nations which exercise or impose this pretended right against states, relatively weak, commit an abuse of power and force which nothing can justify and which is as contrary to their own legislation as to international practice and political expediency.¹⁰

In his discussion of the Aigues Mortes affair in the sixth volume of his work,¹¹ Calvo also denies that a government, "in the absence of all fault on its part," is legally liable for injuries to foreigners which result from mob violence on the grounds that a state is not responsible for acts of mere individuals and that aliens can not claim a more extended protection than is granted to its nationals.

On December 29, 1902, Señor Luis M. Drago, minister of foreign affairs for the Argentine Republic, sent a note to Señor Mérou, the Argentine minister at Washington, which attracted widespread attention in Europe as well as in the United States. In this note, which

⁸ *Op. cit.*, §1280, p. 142. A few pages above (§1278, p. 140), Calvo speaks of the frequent attempts to impose upon American states the rule that "foreigners merit more consideration, and regards and privileges more marked and extended, than those accorded even to the nationals of the country where they reside." Elsewhere (t. vi, §256, p. 231), he observes: "It is certain that foreigners who establish themselves in a country have the same protection as nationals, but they can not lay claim to a protection more extended. If they suffer any wrong they ought to expect the government of the country to pursue the delinquents, but they should not claim from the state to which the authors of the violence belong any indemnity whatever."

⁹ *Ibid.*, §§1281-1296.

¹⁰ *Ibid.*, §1297, pp. 155-156.

¹¹ T. vi, *liv*, xv, §256; cf. t. iii, §1271.

was called forth by the attempt then being made by the allied powers (Great Britain, Germany and Italy) to collect certain claims against Venezuela by forcible means, Señor Drago stated at the outset that he would leave out of account those claims arising from damages suffered by subjects of the claimant nations during revolutions and wars but would confine himself to

some considerations with reference to the forcible collection of the public debt suggested by the events that have taken place.

In respect to loans to a foreign state, he argued that the lending capitalist always takes into account the resources of the country, the kind or degree of credit and security offered, and makes his terms more or less onerous accordingly. He knows that he is dealing with a sovereignty, and

it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it.

This argument he based upon the theory of the freedom and independence of states which lies at the basis of the modern system of international law.

In support of this contention, Señor Drago quotes Alexander Hamilton, who said:

Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

He also cites the eleventh amendment to the Constitution of the United States, which provides that

the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Señor Drago admitted that the payment of its public debt (the amount of which may be determined by tribunals of the country or by arbitration) is absolutely binding on the nation; but he maintained that it (the nation) has a

right to choose the manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein.

He explains that

this is in nowise a defense for bad faith, disorder, and deliberate and voluntary insolvency. It is merely intended to preserve the dignity of the public international entity which may not thus be dragged into war with detriment to those high ends which determine the existence and liberty of nations.

Declaring that the Argentine people were alarmed lest the action of the allied powers in Venezuela "would establish a precedent dangerous to the security and peace of the nations of this part of America" (for "the collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the governments of the countries on which it is imposed;" a "situation" which "seems obviously at variance with the Monroe Doctrine"), and pointing to the danger lest European nations make use of "financial intervention" as a pretext for conquest, this far-sighted Argentine statesman suggests that the United States adopt or recognize the principle

that the public debt [of an American state] can not occasion armed intervention, nor even the actual occupation of the territory of American nations by a European power.¹²

In his message of December 5, 1905, President Roosevelt pronounced himself with his wonted vigor in favor of the Drago Doctrine. After calling the attention of Congress to the embarrassment that might be caused to our government by the assertion by foreign nations of the

¹² For the text of the Drago Note, See House Doc. of 58th Congress, 2d session (1903-04), pp. 1-5.

In a memorandum sent to Señor Mérou in reply to this communication, Secretary Hay discreetly expressed neither assent to nor dissent from the propositions set forth by Señor Drago, but he quoted two passages from recent messages by President Roosevelt to indicate the general position of the government of the United States: "The President declared in his message to Congress of December 3, 1901, that by the Monroe Doctrine we do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American state;" and "in harmony with the foregoing language, the President announced in his message of December 2, 1902: 'No independent nation in America need have the slightest fear of aggression from the United States. It behooves each one to maintain order within its own borders and to discharge its just obligations to foreigners. When this is done they can rest assured that, be they strong or weak, they have nothing to dread from outside interference.' " Secretary Hay closed this communication with a declaration in favor of arbitration in such cases.

right to collect by force of arms contract debts due by American republics to citizens of the collecting nation, and to the danger that the process of compulsory collection might result in the permanent occupation of territory, he said:

Our own government has always refused to enforce such contractual obligations on behalf of its citizen by an appeal to arms. It is much to be wished that all foreign governments would take the same view.

A comparison between the views of Calvo and Drago as above expressed will show that they differ in two very important respects. The Drago Doctrine is much narrower in scope than that of Calvo. Señor Drago merely denounces armed intervention as a legitimate or lawful means of collecting public debts, whereas Calvo denies the right to employ force in the pursuit of all private claims of a pecuniary nature. Indeed, Calvo advances a step beyond this position. He absolutely denies that a government is responsible by way of indemnity for any losses or injuries sustained by foreigners in time of internal troubles, civil war, or for injuries resulting from mob violence (provided the government is not at fault) on the grounds that the admission of such a principle of responsibility would "establish an unjustifiable inequality between nationals and foreigners" and would undermine the independence of weaker states. He does not even admit that the ordinary channels of diplomacy are open to claimants in such cases.

In general, private claims of a pecuniary nature against Latin American states may be classified as follows: 1, Claims arising from acts of violence or oppression, such as cruel treatment, false imprisonment, expulsion or mob violence; 2, those based on losses sustained during civil war or insurrection; 3, those based upon contract, consisting for the most part of claims of bondholders and investors whose investments have been guaranteed by the defaulting government.¹²

¹² So, *e.g.*, the claims of Great Britain and Germany against Venezuela in 1902-03 were divided into three categories: 1, Those based upon the false imprisonment and bad treatment of British subjects and the seizure of British vessels; 2, losses of British and German subjects sustained during recent civil wars and revolutions; and 3, the claims of creditors, including not only ordinary bondholders but also a number of Britons and Germans whose investments had been guaranteed by the Venezuelan government. Also see an article by the writer, entitled *The Venezuelan Affair in the Light of International Law* in the *American Law Register* (May, 1903), vol. 42, n. s., pp. 250 ff.

The liability of a government for acts of violence and oppression must depend upon the circumstances of each case. A state is of course *directly* responsible¹⁴ for acts of its agents and must bear the full consequences of any violation of the laws of nations committed by these. Such acts should be promptly disavowed and, if of sufficient importance, their authors punished and reparation made.¹⁵

In ordinary times a state is also *indirectly* responsible for the orderly conduct of all those residing or domiciled within its territory and subject to its jurisdiction, and is bound, not indeed to prevent all acts of violence against foreigners, but to furnish the same degree and kind of protection and, generally speaking, provide the same means of redress or measure of justice that is granted to its own nationals.¹⁶

In attempting to secure redress or justice, foreigners must in the first instance have recourse to the local or territorial tribunals of the district in which they are domiciled, or, as Vattel¹⁷ puts it, to the "judge of the place." Judicial remedies should, as a rule, be exhausted before resorting to diplomatic interposition for means of obtaining redress.¹⁸ But this rule does not apply in case of a gross or palpable denial of justice, where local remedies are wanting or insufficient, where judicial action is waived, where the act complained of is in itself in violation of international law, or where there is undue discrimination against foreigners on the part of the authorities.¹⁹

¹⁴ This responsibility is to states rather than to individuals. The individual, as such, has neither rights nor duties in international law other than those belonging to him as a citizen or subject to an international entity. On the theory of International Responsibility of States for Injuries Suffered by Foreigners, see two recent articles by M. Anzilotti in the *Revue Générale de Droit International Public* for 1906, pp. 5-29 and 285-309.

¹⁵ This does not apply to the judicial functionaries who are more or less independent of the executive in all modern well-regulated states. "All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to prevent a foreigner from getting equal justice with a native of the country, that a recurrence of the wrong shall be prevented by legislation." (Hall, *Treatise* (3d ed.) §65, p. 214.)

¹⁶ This is the general rule, but it is not, as we shall see, wholly without exception.

¹⁷ Bk. II, ch. 8., §103; *cf.* Bk. II, ch. 6, §§ 72 and 73.

¹⁸ Moore, *Digest of International Law*, vi, §987. Wharton, ii, §241.

¹⁹ For examples of such exceptions, see Moore, §§913-914, 986-993, 1021, and Wharton, §§230 and 242.

It

does not apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversion of justice."²⁰

The question of the liability of a state for injuries to the persons or property of foreigners resulting from mob violence is one in which the people and government of the United States as well as those of Latin America, should be deeply interested. Whether due to the intensity of feeling engendered by race and labor problems or to a lax enforcement of the law resulting from cumbrous and antiquated legal methods, the American custom of lynching for certain crimes and under certain conditions shows little sign of abatement and is not likely to disappear until the causes which lead to it are removed.

The rule which has generally been verbally maintained by American statesmen seems first to have been laid down by Daniel Webster in connection with the riots at New Orleans, and Key West in 1851, which resulted from the summary execution of a number of American filibusters in Cuba. While admitting that the Spanish consul (whose office had been attacked and furniture destroyed)²¹ was entitled to indemnity, Mr. Webster maintained that those Spanish subjects who had been injured in person or property (there seems to have been no one killed) were not entitled to compensation, inasmuch as "many American citizens suffered equal losses from the same cause," and foreigners are merely

entitled to such protection as is afforded to our own citizens. * * * These private individuals, subjects of Her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of law, as native born citizens of this country."²²

As a mark of courtesy and out of respect to the magnanimity of the queen of Spain (in liberating American prisoners), Congress nevertheless granted compensation to Spanish subjects as well as to the Spanish consul for losses sustained during these riots.

History has repeated itself in the case of a number of claims made by foreigners for injuries resulting from mob violence in the United

²⁰ Mr. Evarts, Secretary of State, to Mr. Marsh. Wharton's Digest, iii, p. 695.

²¹ The archives of the consulate had also been thrown into the street, the portrait of the queen of Spain defaced, and the Spanish flag torn to pieces.

²² Wharton's Digest, ii. §226, p. 601; cf. Moore, vi, §1023, pp. 812-813.

States from that day to this. In the majority of these cases, the United States government has refused to admit liability in principle, but has granted compensation as a matter of grace and favor, or from a sense of magnanimity, sympathy, benevolence or policy.²³ Some of our statesmen, however, admit liability in case of a failure on the part of the local authorities or courts to use due, *i. e.*, reasonable, diligence in preventing or punishing such crimes, and this is unquestionably a rule of international law.²⁴

On the other hand, the United States has shown commendable zeal in protecting its citizens from such attacks abroad. It has repeatedly interposed diplomatically in China, Turkey, Mexico, Panama, Chili, Brazil and other Central and South American States.²⁵

In view of this double inconsistency—that of theory and practice on the one hand, and that of our attitude at home and abroad on the other—would it not be wise for our government frankly to admit liability in all cases of attack by mobs upon foreigners as such or upon those of a particular nationality wherever and whenever the local authorities show themselves unwilling or unable to prevent, and the courts unable or unwilling to punish such crimes? Foreigners cannot be expected to appreciate the merits (?) of our present “peculiar” national institution of lynching, and foreign states have an undoubted right to demand a better protection for their nationals against this species of violence than is afforded them by our own local authorities and courts in some parts of this country.

²³ This was notably so in the cases of the 43 Chinese killed and wounded at Rock Springs, Wyoming in 1885 and of the Italians lynched at New Orleans, in 1891. For these and numerous other cases, see Moore's Digest, vi, §1026.

²⁴ This rule is usually stated in language ascribed to Secretary Evarts: “A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed.” See Wharton's Digest, ii, p. 602. But the absence of quotation marks in Wharton and a reference to Evarts' dispatch in Moore's Digest (see vol. vi, pp. 817-818) shows that Mr. Evarts did not use the language ascribed to him. It is, however, a good statement of an undoubted principle of international law if we add the words “and which it fails to punish.” The fact that our Federal government has sometimes been unable to secure justice for foreigners by reason of constitutional or statutory limitations does not affect its international responsibility.

²⁵ Moore, *op. cit.* For the diplomatic activity of the United States in China, see the extremely able communication of the Chinese minister, Cheng Tsao Ju, to Secretary Bayard, on pp. 822-826.

But it may be urged that the admission of such a rule or principle might, in some cases, give to foreigners a protection superior to that enjoyed by its own citizens. This may be true in countries where life and property is insecure from mob violence, but civilized states are supposed to grant at least a fair or average amount of such protection in ordinary times, and it is no adequate reply to a charge of denial of justice²⁶ to, or an undue discrimination against, foreigners to say that nationals frequently suffer similar injustice. It would of course be different in the case of an ordinary miscarriage of justice, where the spirit as well as the forms of the law had been complied with, or in the case of one accidentally killed or injured in the course of a riot or insurrection.²⁷

In view of the recent protest by Japan against the segregation of Japanese school children in California and the surprising ignorance of the principles governing the rights and privileges of foreigners displayed in some quarters, it seems necessary to point out that a state is under no international obligation to extend to foreigners the enjoyment of civil and private rights or to place them upon an equal footing with its own nationals in these respects. Whatever rights or privileges of this kind foreigners may enjoy, whether of an educational, economic or religious nature, are based on convention or the principle of reciprocity, or are granted as a matter of pure grace and favor.²⁸ All that an alien, who is permitted to set foot or reside on foreign territory (and this permission is purely optional) can demand as a matter of strict right in international law is protection of life and property together with access to the local courts for that purpose.

The same principles may, in general, be said to apply to cases of injuries or losses sustained by foreigners during civil war and insurrection, except that the law of necessity or the physical inability to furnish adequate protection generally absolves governments from responsibility in such cases. The general rule is that

a sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control.

²⁶ On what constitutes a denial of justice, see especially, Moore vi, §986; Wharton, ii, §230; and Anzilotti, *op. cit.*, pp. 21-23.

²⁷ See, *e.g.*, the case of Bain in Moore, *op. cit.*, §1027.

²⁸ See especially on this head, the recent article by Anzilotti in the R. D. I. P., cited above, pp. 18-20.

They are

not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. * * * By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicile.²⁹

These principles have been repeatedly enunciated by our leading statesmen,³⁰ as well as by those of Europe,³¹ and they have the almost unanimous sanction of leading authorities on international law.³² They have invariably been applied by European states in their relations with each other, although frequently violated in their dealings with weaker states, more particularly in the cases of China, Turkey and the republics of Latin America.

There are, however, several exceptions which must be made to these general principles. Indemnity would seem to be due to foreigners by way of exception in the following cases: 1. Where the act complained of is directed against foreigners as such, or as subject to the jurisdiction of some particular state. 2. Where the injury results from an act contrary to the laws or treaties of the country in which the act was committed, and for which no redress can otherwise be obtained. 3. When there has been a serious violation of international law, more particularly of the rules of civilized warfare. 4. In cases of evident denial of a palpable violation of justice, or undue discrimination against foreigners on the part of the authorities.³³

²⁹ Wharton's Digest, iii, §223. Secretary Seward to Count Wydenbruck in 1865. See Moore's Digest, vi, pp. 885-886. *cf.* Wharton, pp. 577-578.

³⁰ For numerous opinions of American statesmen, see Moore's Digest, vi, §§1032-1049. *cf.* Wharton, iii, §§223-226.

³¹ See especially the notes of Prince Schwartzenburg (Austrian) and Count Nesselrode (Russian) in reply to certain claims of the British government which were based upon injuries to British subjects during the revolutions in Tuscany and Naples in 1848. Cited by Pradier-Fodéré, i, §205, pp. 343-345 and Moore, *op. cit.*, pp. 886-887.

³² See, *e. g.*, Calvo, iii, §§1280 *ff.*; Pradier-Fodéré, *Traité*, i, §§202 *ff.*, 402 *ff.*, iii, §§1363 *ff.*; Fiore, *Droit Int. Pub.* (Antoine's trans.), i, §675; Wharton, iii, §223; Hall, *Treatise* (3d ed.), §65, pp. 218-219; Bluntschli, §380 *bis*; Funck-Brentano et Sorel, *Précis*, ch. 12, pp. 227-229; Taylor, §216; Oppenheim, i, p. 213; Bonfilis (Fauchille), §§326 *ff.*; Liszt, §24, pp. 189-190; Pillet, *Les Lois de la Guerre*, p. 29; Weiss, *Le Droit International appliqué aux Guerres Civiles*, §14; Bar in R. D. I. for 1899, t. xxix, pp. 464-482. See Brusa in *Annuaire* for 1898, t. xvii, pp. 96-138 for arguments in favor of responsibility.

³³ See especially the rules adopted by the Institute of International Law in 1900. *Annuaire*, xviii, pp. 254-256. *cf.* Moore's Digest, *op. cit.*, Pradier-Fodéré, iii, §1366, p. 237; Bar and Brusa, cited above.

In respect to the third class of claims, viz: those based upon contract, including for the most part those of bondholders and investors whose investments have been guaranteed by the defaulting government, the few authorities who discuss this question appear to be divided in their opinions, with a majority opposed to forcible collection. The right of a state to use coercive measures in the collection of debts of this nature is asserted, *e. g.*, by Hall, Phillimore, and Rivier; but it is denied by Calvo, Pradier-Fodéré, Rolin-Jaequemyns, F. de Martens, Despagnet, Kebedgy, and Nys.³⁴

It is argued, on the one hand, that the public faith, the so-called "honor of the prince," is particularly engaged in the case of contracts of this nature, inasmuch as a government cannot be sued without its own consent; that creditors may have no other means of redress than that of appealing to the government of the state to which they owe allegiance; that stock in the public debt held even by an enemy is exempt from seizure and its interest payable even in time of war; and that states, being in legal theory free and independent and having no common superior to control or check them in any way, each state has therefore the legal right of deciding for itself when its rights have been invaded and of determining the conditions under which it may use force for any purpose whatsoever.³⁵

On the other hand, it is urged that hazardous loans and investments should be discouraged as much as possible; that those making them

³⁴ Hall, §86, pp. 277-279; Phillimore, ii, pt. v, ch. 3, pp. 26-30; Rivier, i, *liv*, iv, ch. 2, §20, pp. 272-273; Calvo, i, §205, p. 350; Pradier-Fodéré, i, §405, pp. 620-623; Rolin-Jaequemyns in R. D. I., t. i (1869), pp. 145 ff.; F. de Martens in R. D. I., t. xix, p. 386 and in a recent pamphlet, entitled *Par la Justice vers la Paix*; Despagnet, Cours, §258; Kebedgy in R. D. I. P., t. i, p. 261, and Nys, ii, p. 225.

On April 17, 1903, the publicist Calvo, then representing the Argentine Republic at Paris, addressed a circular letter to a number of leading authorities on international law, asking for their views on the question raised by the Drago note. Of the ten opinions published in the *Revue de Droit International* (see R. D. I. for 1903, pp. 597-623), six (those of Passy, Moynier, Campos, Férand-Giraud, Weiss and Olivecrona) were in substantial agreement with the principals of the Drago note. Four (those of Westlake, Holland, Charmes and Fiore) were more reserved. While apparently not in absolute disagreement with the principles of the Drago note, they held either that it needed qualification or that the question was undecided. For a brief analysis of these opinions, see Percy Bardwell in the *Green Bag* for July, 1906, pp. 378-379.

³⁵ Such is, *e. g.*, the argument of G. W. Scott in the *North American Review* for October 5, 1906, pp. 603-604.

do so, as a rule, with a full knowledge of the risks incurred and in the hope of exceptionally large returns; that the natural penalty of a failure on the part of a state to fulfill its obligations is a loss of credit; that foreigners cannot expect to be preferred to native creditors; that coercive measures for the collection of bad debts are never employed except against weaker states and are likely to be used as a pretext for aggression or conquest; and that

it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it.³⁶

The views of British and American statesmen are not in complete harmony on this important subject, although the general policy of Great Britain and the United States has been substantially the same.³⁷ The English view, as stated by Lord Palmerston, in 1848, in a circular addressed to representatives of Great Britain in foreign countries, insists that the question as to whether such claims are to be made a subject of diplomatic negotiation is

for the British government entirely a question of discretion, and by no means a question of international right.

With a view, however, of discouraging the investment of British capital in hazardous loans to foreign governments and of encouraging investment in profitable undertakings at home,

the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

But he intimates that such loss might become so great as to make a change of policy on the part of the British government advisable. These views of Lord Palmerston were reaffirmed by Lord Salisbury in January, 1882, and by Premier Balfour in December, 1902.³⁸

³⁶ Señor Drago in note, cited above.

³⁷ Except for the British intervention in Mexico, Egypt and Venezuela. But in all these cases those representing the government of Great Britain denied that they intervened primarily for the sake of the bondholders.

³⁸ For the text of this circular, see Hall, note on pp. 278-279 (3d ed.), and Phillimore ii, t. v, ch. 3, pp. 27-28. In 1861, Lord John Russell, in a communication to Sir C. I. Wyke, stated that "it has not been the custom of Her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments."

The policy of the United States³⁹ in dealing with claims based on contracts was thus stated by Secretary Fish in 1871:

Our long-settled policy and practice has been to decline the formal intervention of the government except in cases of wrong and injury to person and property such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts.

In cases founded upon contract, the practice of this government is to confine itself to allowing its minister to exert his friendly good offices in commending the claim to the equitable consideration of the debtor without committing his own government to any ulterior proceedings.⁴⁰

In 1881, Secretary Blaine laid it down as "a rule of universal acceptance and practice" that a person

voluntarily entering into a contract with the government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into for redress.⁴¹

The representatives of the United States at the third Pan-American conference, which met at Rio de Janeiro during the months of July and August, 1906, were given the following instructions:

It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments. We have not considered the use of force for such a purpose consistent with that respect for the independent sovereignty of other members of the family of nations, which is the most important principle of international law and chief protection of weak nations against the oppression of the strong. It seems to us that the practice is injurious in its general effect upon the relations of nations and upon the welfare of weak and disordered states, whose development ought not be encouraged in the interests of civilization; that it offers frequent temptation to bullying and oppression and to unnecessary and unjustifiable warfare. We regret that other powers, whose opinions and

³⁹ For the opinions of American statesmen on this head, see Moore's and Wharton's Digest, §§916, 918, 995-998; and §§231-232, respectively.

⁴⁰ Moore's Digest, vi, §995, p. 710. *c.f.* Wharton, ii, §231, p. 656.

⁴¹ Wharton's Digest, ii, pp. 658-659. But exceptions have been made in cases where diplomacy furnished the only means of redress, as in case of non-performance of a government contract, or arbitrary confiscation of vested rights, or of annulment of charters or concessions. For examples, see Moore's Digest, vi, §§918, 996 and 997 and Wharton, ii, §232. "International commissions have frequently allowed claims based on the infraction of rights derived from contracts where the denial of justice was properly established," Moore, p. 718.

sense of justice we esteem highly, have at times taken a different view and have permitted themselves, though we believe with reluctance, to collect such debts by force.⁴ It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrongdoing or violation of treaties as to justify the use of force. This government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.

It is not felt, however, that the conference at Rio should undertake to make such a discrimination or to resolve upon such a rule. Most of the American countries are still debtor nations, while the countries of Europe are the creditors. If the Rio conference, therefore, were to take such action it would have the appearance of a meeting of debtors resolving how their creditors should act, and this would not inspire respect. The true course is indicated by the terms of the program, which propose to request the second Hague conference, where both creditor and debtors will be assembled, to consider the subject.⁴

It will thus be seen that whereas Great Britain has, generally speaking, refrained from diplomatic intervention in such cases purely from motives of policy or expediency, the United States appears to have been restrained, to a certain extent at least, by principle and by a regard for what it believed to be the law of nations.

When we turn to international practice, which is, generally speaking, the basis of international law, we find, it is true, a considerable number of instances not merely of pacific or diplomatic interposition, but of actual armed intervention on financial grounds, as *e. g.*, in Mexico, Egypt, Portugal, Nicaragua, Venezuela, and in Turkey. But a closer scrutiny and reflection will not fail to convince us that these cases are altogether exceptional and only serve to prove that the ordinary everyday rule is that of non-intervention.

It is obvious that the question of the forcible collection of all claims of a pecuniary nature (we are not speaking of diplomatic intervention or interposition) must be decided in accordance with the principles governing the intervention of one state in the internal affairs of another.

The subject of intervention is one of great difficulty and complexity. This arises from the fact that there exists nowhere else within the wide range of international relations such an apparent conflict between politi-

⁴ From President Roosevelt's recent message to Congress of December 4, 1906.

cal theory or fundamental principles on the one hand and actual international practice on the other. The whole modern or Grotian system of international law rests upon the doctrine of the absolute legal equality and complete independence of fully sovereign states. This presupposes full liberty of action on the part of each sovereign within his own sphere or jurisdiction and non-interference in the external or internal affairs of other sovereigns. The rule or doctrine of non-intervention is therefore a necessary corollary of the doctrine or principle of the complete equality and independence of sovereign states and is a fundamental principle of international law.

But international law is supposed to rest upon international practice as well as upon fundamental principles, and when we turn to examine the actual practice of sovereign states, and especially that of the great powers during the nineteenth century, we find numerous examples of armed intervention on all sorts of grounds and pretexts. Intervention on grounds of morality or humanity, *e. g.*, to put an end to great crimes and slaughter or to various forms of cruelty and oppression (as in the case of religious persecution), to prevent the extermination of a race or a needless diffusion of blood, to assure the triumph of right and justice, etc.; intervention on grounds of policy or interest, *e. g.*, to secure the balance of power or maintenance of political equilibrium in Europe, to enforce protection of the persons and property of citizens or subjects of the intervening state, to prevent the spread of political heresy or revolution, to advance the interests of civilization, etc.; interventions on so-called legal grounds, for the sake of self-preservation, to prevent or terminate the unjustifiable or illegal intervention of another state, to enforce treaties of guarantee or fundamental principles of international law: these are some of the grounds or pretexts which have been advocated as sufficient causes for armed intervention in particular cases.

Authorities on international law have always differed widely in their opinions as to what constitute legal or justifiable grounds for intervention or whether, indeed, there exists any such right at all. The only approach to unanimity is in respect to the right of self-preservation which is, properly speaking, not a law at all in the ordinary sense of that term as applied to positive rules and regulations, but is a fundamental right or principle which underlies and takes precedence of all

systems of positive law and custom, and from whose operation neither nations nor individuals could escape if they would.

The present tendency among publicists is certainly toward the acceptance of the principle of non-intervention as the correct and normal or every-day rule of international law and practice;⁴⁵ but to admit intervention as a legitimate exercise of sovereign power in extreme or exceptional cases on high moral or political rather than on purely legal grounds, as for instance in case of great crimes against humanity (Greece, Armenia, and Cuba) or where essential and permanent national or international interests of far-reaching importance are at stake (Ottoman Empire, Mexico, or Panama).

Like war, "intervention is not, strictly speaking, a right in the ordinary legal sense of that term, although, like war, it is a source of legal rights and duties. Like war it is an exercise of sovereign or high political power, a right inherent in sovereignty itself. "The government which intervenes performs a political act."⁴⁶ "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law,"⁴⁶ but which is either "above and beyond the domain of law,"⁴⁷ and a justifiable exception to the ordinary, everyday rule of non-intervention, or an act based upon the mere consciousness of physical force. Inasmuch as a sovereign who chooses to exercise this

⁴⁵ Among modern authorities on international law, who either deny the right of intervention or accept the principle of non-intervention with or without exceptions, the following may be cited: Bonfils (Fauchille) §§295-324; Heffter (Geffcken), §§44-46; Woolsey, §43; Wilson and Tucker, §41; Walker, *Science*, pp. 112, 151; De Floecker, *Del'Intervention* (1896), ch. 2, §3; F. de Martens, *Traité*, i, §76, pp. 394 ff.; Liszt, §7, pp. 60 ff.; Despagnet, *Cours*, pp. 188 ff.; Funck-Brentano et Sorel, *Précis*, pp. 212-216; P. Fodéré, *Traité*, §355; Rivier, *Principes*, i, pp. 390 ff.; Nys, *Le Droit Int.* (1905), ii, pp. 182-193, especially p. 191; Merignac, *Traité* (1905), i, pp. 284 ff. Calvo is not among the champions of non-intervention. Several of the authorities above cited like P. Fodéré and Funck-Brentano et Sorel deny the legal character or validity of the principle of non-intervention as well as that of intervention. The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme and exceptional cases.

⁴⁶ It differs from war in that a mere threat to use force is sufficient to constitute an intervention. In case of resistance, it almost inevitably leads to war.

⁴⁶ Funck-Brentano et Sorel, *Précis*, pp. 212-216. For a brief exposition of this view, which is believed to be that of the most advanced publicists in Europe, see an article by Professor Georg Jellinek in 35 *Am. Law Review*, pp. 56-62.

⁴⁶ Letters of Historicus by Sir W. Harcourt, p. 41.

⁴⁷ Lawrance, *Principles*, pp. 121.

supreme assertion of political power cannot as a rule be restrained except by the counter use of force, it may become necessary for another or other interested sovereigns to exercise a similar political power and intervene against such unjust or injurious act of intervention.

We trust it is now sufficiently clear to all as to what our attitude as a nation is or should be toward the Calvo and Drago Doctrines. Both the wider Calvo and the narrower Drago Doctrines are essentially sound in principle and expedient as policy, although Calvo goes too far in condemning diplomatic interposition or the presentation of claims for indemnity in all cases under consideration, and he does not sufficiently allow for exceptions to general rules or principles which are otherwise sound and correctly stated by him. The range and character of these exceptions have been indicated in the first part of this article.

While we do not deny the responsibility of governments to foreigners and their liability in certain cases, even during times of civil war and insurrection, it is certain that the major part of such demands are usually far in excess of liability and are based on erroneous principles. The following examples, selected for the most part from Moore's *Work on Arbitration*, may serve to illustrate the exorbitant amounts of most of these claims.⁴⁸

The Civil War claims of Great Britain against the United States, which were settled by a mixed commission in 1873, amounted (with interest) to about \$96,000,000. Less than \$2,000,000 was actually awarded to the British claimants. Of the 478 British claims, 259 were for property alleged to have been taken by the military, naval or civil authorities of the United States; 181 for property alleged to have been destroyed by the military and naval forces of the United States; 7 for property destroyed by the Confederacy; 100 for damages for the alleged unlawful arrest and imprisonment of British subjects by the authorities of the United States; 77 for damages for the alleged unlawful capture and condemnation or detention of British vessels and their cargoes as prize of war by the naval forces and civil authorities of the United States.⁴⁹

⁴⁸ In a recent pamphlet, entitled *Par la Justice vers la Paix*, Professor F. de Martens calls special attention to the excessive and fraudulent character of many of these claims.

⁴⁹ See Moore on *Arbitration*, i, pp. 692-693.

The claims of France growing out of the Civil War were also settled by a mixed commission which met in 1880-84. They aggregated about \$35,000,000. The amount actually awarded was \$625,566.35, *i. e.*, less than 2 per cent of the amount demanded. Many of the claims are said to have been fraudulent and others were greatly exaggerated. Most of the awards were for injuries inflicted by the armies of the United States, *i. e.*, presumably for violations of the laws of warfare.⁵⁰

The claims of the citizens of the United States against Mexico, presented to the mixed commission which met in July, 1869, and continued in session until January, 1876, amounted to the enormous sum of \$470,000,000. The actual amount awarded was \$4,000,000 or less than one per cent. The claims of citizens of Mexico against the United States amounted to \$86,000,000. They received \$150,000.⁵¹

The mixed commissions which adjudicated the claims against Venezuela at Caracas during the summer of 1903, awarded 2,313,711 bolivars to claimants of the United States out of 81,410,952 which were demanded; 1,974,818 to Spanish claimants who had demanded 5,307,626; 2,975,906 to Italian claimants who had asked for 39,844,258; 2,091,908 to German claimants who had demanded 7,376,685; 9,401,267 to British claimants instead of 14,743,572 as demanded; and 10,898,643 to Belgian claimants who had only demanded 14,921,805 bolivars.⁵² The demands of French claimants, which amounted to nearly \$8,000,000 were cut down to \$685,000.⁵³

Besides being excessive in amount, it is believed that many of these claims are bottomed on fraud and tainted with illegality and injustice. It is notorious that the sums received by a government are often far below the face value of the loan and many of the claimants for losses during civil war or insurrection are not above a well-grounded suspicion of having themselves been engaged in unneutral or insurrectionary acts.

In view of the ill-founded character of many, if not most, of such claims and of the danger to the peace and safety of the states of Latin America resulting from their forcible collection by leading European

⁵⁰ Moore, ii, pp. 1133 ff., 1156 ff.

⁵¹ Moore, ii, pp. 1319 ff.

⁵² These figures are taken from Latané's excellent article on "The Forcible Collection of International Debts" in the *Atlantic Monthly* for October, 1906, p. 546.

⁵³ This is based on a statement in the *Outlook* (1906), vol. 82, p. 104.

powers, the United States would be fully justified even in advancing a step beyond the Drago Doctrine and declaring formally to the world that it could not see with indifference any attempt at the forcible collection of private claims of a pecuniary nature on the Western Continent.⁵⁴ The Monroe Doctrine, at least in its present form, forbids the further acquisition, colonization, or permanent occupation of American territory by any European power, and it is believed that such a declaration would not only be in harmony with the spirit of that doctrine but that it would lend strength to the principle of non-intervention.

In view, however, of the fact that some of these claims may be well-founded and that the judicial tribunals in certain portions of Central America are notoriously inadequate for the impartial and effective administration of justice, and because of the frequency of revolutions due mainly to fraudulent elections, it might be well to couple this declaration with another, insisting that all such claims be submitted to fair and impartial arbitral tribunals or mixed commissions composed of representatives from both the creditor and debtor nations.⁵⁵

The United States has no desire to become a "debt collecting agency" for European creditors or to establish a protectorate over the states of Latin America. For these reasons our government should avoid, if possible, the responsibility of an *ex parte* decision regarding the validity of these claims, although the assumption of such a burden would be preferable to their forcible collection by European powers. Our insistence upon arbitration in the case of the famous boundary dispute between Great Britain and Venezuela in 1895, points the way toward what is at once the easiest and most equitable settlement of such disputes.

AMOS S. HERSHEY.

⁵⁴ The wisdom of such a course is greatly strengthened by the decision of the Hague tribunal rendered on February 22, 1904, which granted the contention of the allies that they were entitled to preferential treatment in consequence of their coercion of Venezuela. For a recent thoroughgoing criticism of this decision, see a long article by M. Mallarmé in the *Revue Générale D. I. P.* for 1906, pp. 423-500.

⁵⁵ Professor F. de Martens suggests the Hague tribunal as a suitable court for the arbitration of these claims, but in view of its decision in the Venezuela case, it would perhaps be better to retain the present system of mixed commissions.

INSURGENCY AND INTERNATIONAL MARITIME LAW

War in the full sense, according to international law, can exist only by declaration or recognition of belligerency by a state. War in the material sense of an actual contest of armed forces may and does often exist without such declaration or recognition. However desirous a party using armed force within a state and in opposition to it may be to be regarded as a belligerent, such a party has not the legal capacity to raise itself to a belligerent status. This status can be gained only by action of the parent state or of a foreign state. An armed contest may, nevertheless, exist and of this fact others must often take notice.

Between the struggle of individual with individual, and of state with state, there is a form of struggle varying according to the circumstances, but usually an armed struggle between organized groups or parties within a state for public political ends which has received the name of insurrection.

The Constitution of the United States distinctly provides that Congress shall have power

to provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections, and repel invasions. (Art. 1, § 8.)

The government also recognizes that insurrections may exist in foreign states as in Article 308 of the Regulations for the Government of the Navy of 1905:

The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries, officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

The United States and other governments have admitted that insurrections were actually in existence. The United States in its relations to Cuba has frequently been called upon to consider the nature of

insurrectionary conflicts. President Grant, in his first message of December 6, 1869, speaking of the struggle in Cuba, says:

But the contest has at no time assumed the conditions which amount to a war in the sense of international law, or which show the existence of a *de facto* political organization of the insurgents sufficient to justify a recognition of belligerency.

It is generally held that an insurrection does not "amount to a war in the sense of international law," but, as President Grant maintains, each

nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive or to independent nations at war with each other.

The long struggle in Cuba, from 1868 to 1878, seems to have had, even from a foreign point of view, many of the characteristics of war. Such formal public documents, as Presidents' Messages, though addressed to Congress rather than to foreign powers, mention "the pending struggle," "bloodshed in Cuba," "disturbed condition of the island of Cuba," "insurrection," "contest," "deplorable strife in Cuba," "contending forces," "ruinous conflict," and other terms which indicate that the government did admit that the status of the island of Cuba was not that of peace. The Message of President Hayes, of December 2, 1878, stated that

the Spanish government has officially announced the termination of the insurrection in Cuba and the restoration of peace throughout that island.

President Grant's Message, of December 7, 1875, often quoted since that time, discusses quite fully the reasons for not recognizing the belligerency of the "body of people" attempting to free themselves from Spain.

While conscious that the insurrection in Cuba has shown a strength and endurance which make it at least doubtful whether it be in the power of Spain to subdue it, it seems unquestionable that no such civil organization exists which may be recognized as an independent government capable of performing its international obligations and entitled to be treated as one of the powers of the earth.

* * * * *

In a former message to Congress I had occasion to consider this question, and reached the conclusion that the conflict in Cuba, dreadful and devastating as were its incidents, did not rise to the fearful dignity of war. Regarding it now, after this lapse of time, I am unable to see that

any notable success or any marked or real advance on the part of the insurgents has essentially changed the character of the contest. It has acquired greater age, but not greater or more formidable proportions.

* * * * *

Applying to the existing condition of affairs in Cuba the tests recognized by publicists and writers on international law, and which have been observed by nations of dignity, honesty, and power when free from sensitive, or selfish and unworthy motives, I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other states, with courts for the administration of justice, with local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection or occasional skirmishes and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it.

Other Presidents of the United States have admitted the status of insurrection and commented upon its consequences. President Cleveland, in his Message of December 2, 1895, mentioned certain possible conditions which may exist and certain obligations which may result and yet there may not be war, but only insurrection. He said:

Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

President McKinley followed closely the opinions of the Messages of President Grant. In his Message of December 6, 1897, President McKinley said:

Of the untried measures there remain only: Recognition of the insurgents as belligerents; recognition of the independence of Cuba; neutral intervention to end the war by imposing a rational compromise between the contestants, and intervention in favor of one or the other party.

The courts of the United States would necessarily recognize such domestic insurrections as are mentioned in Art. I, §8, of the Constitution. The courts have also recognized the existence of insurrection

in foreign states. In the case of *The Three Friends* the Supreme Court, referring to such clauses of Presidential Messages as are quoted above, said:

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place, and it cannot be doubted that, this being so, the neutrality act in question is applicable.

It is evident that a status between peace and belligerency is recognized by the various departments of the government of the United States. This is not the status of non-hostile redress which has long been mentioned in books on international law, but a status which while not war may have certain consequences and characteristics of war.

As the Supreme Court of the United States declared in the case mentioned above:

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

The English courts have taken a similar position, maintaining that certain facts of Parliament become effective since

their lordships find these propositions established beyond all doubt—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba. (Salvador, L. R. 3, P. C. 218.)

The distinction between insurgency and belligerency, or as was well said in the opinion of Chief Justice Fuller in the case of *The Three Friends*, between “war in a material sense” and “war in a legal sense,” has received far more recognition in international practice than in international law. It would seem that this status of insurgency recognized by the courts and by the other departments of government should not be ignored by students of international law.

The existence of an insurrection, such as referred to in the Constitution of the United States, may be a matter largely of domestic concern, but particularly since the middle of the nineteenth century and with the development of maritime relations, there has developed a body of international practice in regard to insurrections in foreign states.

Domestic law applies only to a limited extent on the high sea. It is necessary that some law should be recognized, as the high sea is open to all. In order that conflicts may be avoided a body of generally accepted practices and principles, called maritime international law, has developed. With the change in conditions this law has changed and is still changing. The extension in recent years of struggles of parties subject to a state beyond the jurisdiction of the state or the contact of the party in opposition to the parent state with citizens of foreign states has given rise to certain practices which have become generally recognized as proper and expedient. It is certain that the early maritime international law of war was concerned with parties having belligerent status and these laws were the same for all those engaged whether state with state or state with other belligerents.

When a domestic struggle which has not yet attained the status of belligerency extends to the sea, foreign states are naturally affected and should have some rules to govern their conduct and to determine their treatment of the party to the struggle which is not yet recognized as a state or as a belligerent. In the exceptional case in Brazil in 1893-94, when the party in opposition to the parent state relied entirely on a naval force, foreign states were widely affected.

President Cleveland in 1895 issued a proclamation upon the subject of the insurrection in Cuba as follows:

WHEREAS, The island of Cuba is now the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity; and

WHEREAS, The laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on

foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government:

Now, therefore, in recognition of the laws aforesaid and in discharge of the obligations of the United States toward a friendly power, and as a measure of precaution, and to the end that the citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties, I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same.

Such admission of insurgency implies generally (1) that there is within the disturbed state a hostile, armed uprising temporarily beyond the control of its civil authority; (2) that this party is pursuing public ends by force, *i. e.*, endeavoring to change the form of government to reform the administration, or to attain some similar object; (3) that the conditions within the state are so disturbed as to materially affect outside states, and (4) that in the absence of control by the parent state outside states must have some relations with the insurgents.

Mr. Chief Justice Fuller, in the case of *Underhill v. Hernandez*, November 29, 1897, says:

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by any acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. (168 U. S. 250.)

English, American and other courts have recognized that the existence of an insurrection changes the status of certain persons and may bring new rights and duties. The United States courts have decided that the admission of the existence of insurgency brings into operation the neutrality laws, and the English courts have made similar decisions in regard to the foreign enlistment act.

In 1895 when Madagascar uprose against French authority, Great Britain considered issuing a declaration of neutrality. The French

ambassador protested that such a course would be unusual. Great Britain refrained from issuing the declaration, apparently considering the revolted protectorate in the same category with a revolting colony, or other dependency. The French, however, observed the laws of war in their treatment of the insurgents. The English law and practice maintains that insurrection in a dependent community "is waging war upon the queen," and that this is an act which may involve annexation of the revolting territory. England has, however, treated these uprisings, as in the case of Manipur, 1891, as crimes to which the penal law extended, justifying thus the execution of the leaders of the revolt as criminals. In the case of the Abyssinian revolt of 1895, Italy announced, on the twenty-fifth of July, that no foreign state had relations to or right to interfere with the insurgents. Great Britain seems to have taken a like position, at first, with reference to the South African republic, indicating that she would not view with favor any foreign propositions touching her attitude toward that republic; indeed, that there was no war in South Africa. It is evident from such cases that the parent state may prefer to admit the existence of an insurrection while not acknowledging the existence of belligerency. Policy may also influence a foreign state to prefer to admit the existence of an insurrection rather than to recognize belligerency. President McKinley, in his message of December 6, 1897, thus summarizes the matter as regards Cuba:

Turning to the practical aspects of a recognition of belligerency and reviewing its inconveniences and positive dangers, still further pertinent considerations appear. In the code of nations there is no such thing as a naked recognition of belligerency unaccompanied by the assumption of international neutrality. Such recognition without more will not confer upon either party to a domestic conflict a status not therefore actually possessed or affect the relation of either party to other states. The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring state. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all the citizens and others within the jurisdiction of the proclaimant that they violate those rigorous obligations at their own peril and cannot expect to be shielded from the consequences. The rights of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good prize under admiralty law must under international law be admitted as a legitimate consequence of a proclamation of belligerency. While according to the

equal belligerent rights defined by public law to each party in our ports disfavours would be imposed on both, which while nominally equal would weigh heavily in behalf of Spain herself. Possessing a navy and controlling the ports of Cuba her maritime rights could be asserted not only for the military investment of the island but up to the margin of our own territorial waters, and a condition of things would exist for which the Cubans within their own domain could not hope to create a parallel; while its creation through aid or sympathy from within our domain would be even more impossible than now, with the additional obligations of international neutrality we would perforce assume.

Or, as summarized by Professor John Bassett Moore, at that time:

Moreover, the Cuban insurgents can at the present time purchase arms and munitions of war; they and their friends and sympathizers can go and come, unarmed and unorganized, to take part in the conflict; they can sell their securities to any one who will buy them. More than this they could not do, if their belligerency were recognized, unless they had ships on the ocean. They could neither employ persons in the United States to serve in their forces, nor fit out and arm vessels in our ports, nor set on foot hostile expeditions from our territory. On the other hand, Spain would be immediately invested by international law, as well as by the treaty of 1795, with the international rights of belligerency, which she has so far not claimed, including the right of visitation and search on the high seas, and the capture and condemnation of our vessels for violations of neutrality. It would enable Spain practically to put an end to the transportation of munitions of war for the insurgents. It would place under Spanish supervision all that vast commerce which passes through the waters adjacent to Cuba. (21 *Forum*, 297.)

In other words, a foreign state which recognizes the belligerency of a party to a domestic conflict thereby changes the status of the parties concerned, giving to the parties in the conflict a war status with its obligations and duties and assuming for itself the rights and obligations of neutrality. Prior to such recognition, if the parent state does not recognize the existence of war, the foreign state is largely judge of its relations to and conduct toward the parties to the domestic conflict. There may be political, commercial, geographical, or other conditions which make it inexpedient for a foreign state to recognize an insurgent party as a belligerent.

It is evident that there may be many reasons why a foreign state would be disinclined to recognize insurgents as belligerents while at the same time the foreign states might be obliged to take cognizance of the existence of the insurrection. It is the fact that this status of insurrection brings new obligations to states and in some cases advantages.

There may also be reasons which make the parent state reluctant to recognize its insurgent subjects as belligerents, thus giving them full war status at home and abroad. Sometimes the parent state has endeavored before any recognition of belligerency to prescribe the attitude of foreign states toward its rebellious subjects. This has been a common procedure on the part of the states where revolutions have been frequent. Many questions were raised in 1885 during the insurrection in the United States of Colombia. The President of Colombia decreed:

That as the vessels of the opposing party in the port of Cartagena were flying the Colombian flag, it was in violation of right and placed that party beyond the pale of international law.

The United States refused to recognize the validity of the decree as affecting the relations of its officers to the insurgent party and Great Britain took a similar stand. Hall has well said:

It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things and which may in fact have already succeeded in setting it up, are piratical for want of external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question.

Yet acts of the insurgents are liable to such penalties as the parent state may inflict. Foreign states do not generally take extreme measures against insurgents. They do not permit visit and search on the high seas, as the obligation to submit to this interference with the freedom of commerce rests upon a neutral only when there is war, and until there is war there can be no neutral in the sense of international law. The right of visit and search is of course denied to the parent state on the same grounds as to the insurgent.

As regards relations of insurgents and parent state it may be said that they must so far as possible observe the rules of civilized warfare. This is expedient in order that the parent state may maintain the respect of sister states and in order that the insurgents may, if successful, be more readily admitted into the family of nations.

It is fully established that decrees of the parent state putting those in insurrection against it beyond the pale of law, or condemning them to unusual treatment, are not binding upon foreign states. Such a decree may be regarded as an admission by the parent state of the

existence of an insurrection within its borders. The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective.

The United States was early in the Civil War forced to give up the claims that the confederate cruisers were piratical and that other forces were bands of outlaws.

Attempts were also made in 1885 to induce the United States to prevent the sale of arms to the Colombian insurgents, but Mr. Bayard said in a letter of March 25, 1885:

That the existence of a rebellion in Colombia does not authorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia.

Attempts have also been made by the parent state to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign states have, however, usually taken the position that such decrees are of no effect and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance.

The parent state cannot prescribe the attitude which a foreign state shall assume toward insurgents. It is, however, within the competence of the foreign state to determine its own attitude toward insurgents so far as this may accord with the laws of humanity and its obligations to a friendly state. The foreign state has full right to deny to the insurgents the right to exercise any belligerent rights toward its subjects. A foreign state, for example, would not be under any obligation to allow the exercise of the right of visit or search of its vessels and if its vessels were seized by insurgents, the war vessels of the foreign state might rescue them on the high seas. Admiral Benham, at the time of the Brazilian revolt of 1893-94 took a position which has been generally approved. He maintained that American merchant vessels in the harbor of Rio Janeiro were liable to risk if they came within the field of actual hostile operations during the continuance of an engagement, but that interference by insurgents with legitimate movements of American merchant vessels at other times would not be permitted.

A foreign state would not permit the parent state to prescribe the attitude which the foreign government should assume toward its insur-

gent subjects. A foreign state would not permit the insurgents to prescribe what attitude the foreign government should assume toward other parties involved in the insurrection. Probably the most frequent action of this kind on the part of the insurgents, is seen in the attempt of the insurgents to proclaim blockades. It is clear, however, that blockade is a war measure and involves the existence of courts to pass upon its violations and to decree penalties. In absence of such responsible courts a foreign state would not be under obligation to respect such insurgent proclamation. No more would a foreign state permit insurgents to visit and search its merchant vessels on the high seas or to make captures. As Secretary Hay said:

It seems important to discriminate between the claim of a belligerent to exercise quasi-sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theater of insurrection, is effected at the insurgent's risk.

He also maintained that

within the territorial limits of the country, the right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. (Letter to Secretary of Navy, November 15, 1902.)

The Institute of International Law, at its twentieth session in September, 1901, referring to the relation of a foreign power to an insurgent blockade adopted the following resolution:

Tant qu'elle n'aura pas reconnu elle-même la belligérance elle n'est pas tenue de respecter les blocus établis par les insurgés sur les portions du littoral occupées par le gouvernement régulier.

It is unfortunate that the word blockade has ever been used by insurgents, as by the provisions of the Declaration of Paris, 1856, the word was definitely aimed to describe a war measure. A statement of the fact as supported by recent practice and opinion is that

insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade, according to the definition of international law.

There is no responsible body behind the insurgents.

An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally followed by admiralty proceedings for condemnation as good prize, and if such proceedings were nominally resorted to a decree of the condemning court would lack the title to that international respect which is due from sovereign states to the judicial acts of a sovereign. The judicial power being a coördinate branch of government, recognition of the government itself is a condition precedent to the recognition of the competency of its courts and the acceptance of their judgments as internationally valid.

Nor is foreign state bound to recognize an act of an insurgent as proper because some other foreign state has recognized the insurgents as belligerents.

In the letter mentioned above, Secretary Hay also said:

To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities. Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not *create* a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency.

This also accords with European opinion and with the resolutions of the Institute of International Law in 1901.

What has been said of blockade applies in principle to other insurgent action involving warlike operations. The insurgent cannot be permitted to attack neutral commerce, or exercise belligerent rights over neutrals. In the Chilean revolution of 1891, the diplomatic representatives of the United States, Germany, France and Great Britain, after consultation, declared the insurgent blockade illegal, the British admiral by implication left open the question as to whether there might not be contraband of war during an insurrection. Such a position could not be sustained as the insurgents are not responsible and cannot condemn goods as contraband with any more propriety than they can establish a blockade. They lack the proper prize tribunal.

Balmaceda, in 1891, declared various ports of Chili closed. Some of the European states, as well as the United States, declined to respect the decree. If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure to be respected must be by effective force.

A general agreement on the part of various states was shown in their attitude toward the Haitien insurgents in 1902. This is evident in the letter of the commander of the U. S. *Machias*, to the insurgent commander on August 10, 1902. The letter was as follows:

SIR: I wish to give you notice that I am charged with the protection of British, French, German, Italian, Spanish, Russian and Cuban interests, as well as those of the United States. You are informed, also, that I am directed to prevent the bombardment of this city without due notice; also to prevent any interference with commerce by the interruption of telegraph cables or the stoppage of steamers engaged in innocent trade with a friendly power. All interference excepting with Haitien interests I shall endeavor to prevent.

That insurgents have not belligerent status is sufficient reason for refusing to their vessels the rights of belligerents in foreign ports.

Section 4295 of the United States Revised Statutes made it lawful for a private vessel to resist the aggression of an insurgent not yet recognized as a belligerent. This statute provides:

The commander and crew of any merchant vessel of the United States, owned wholly or in part by the citizens thereof, may oppose and

defend against any aggression, search, restraint, depredation or seizure which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

While insurgents are thus restricted in their actions as regards foreigners, yet foreigners may not with impunity come within the field of actual hostile operations. Admiral Benham in the Brazilian revolution of 1893-94, admitted that any movement on the part of American merchant vessels during the continuance of actual hostile operations was at their own risk. The principle is generally accepted that no obligation to pay an indemnity exists when the party injured in an insurrection brings the injury upon himself.

It is also evident that the existence of an insurrection may cause inconvenience to a foreign state and, in some instances, notably in the case of the United States, it is admitted that it may bring into operation the domestic laws in regard to neutrality.

The neutrality laws of the United States forbid citizens to accept within its jurisdiction a commission or enlist others to serve a foreign prince, state, colony, district, or people at war with a similar body with which the United States is at peace. The courts have held that this applies to cases of insurrection as being war in a "material sense."

Similarly citizens may not fit out vessels. The government may expel foreign vessels from port if they act in violation of the neutrality laws.

Insurgency, then, may be regarded as a fact which is generally accepted in the international practice. The admission of this fact is by such domestic means as may seem expedient. This admission is made with the object of bringing to the knowledge of citizens, subjects, and officers of the state such facts and conditions as may enable them to act properly. In the parent state the method of conducting the hostilities may be a sufficient act of admission, and in a foreign state the enforcement of a neutrality law. The admission of insurgency by a foreign state is a domestic act which can give no offense to the parent state as might be the case in the recognition of belligerency. Insurgency is not a crime from the point of view of international

law. A status of insurgency may entitle the insurgents to freedom of action in lines of hostile conflict which would not otherwise be accorded, as was seen in Brazil, in 1893-94, and in Chili in 1891. It is a status of potential belligerency which a state, for the purpose of domestic order, is obliged to recognize. The admission of insurgency does not place the foreign state under new international obligations as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome. It admits the fact of hostilities without any intimation as to their extent, issue, righteousness, etc. The admission of the existence of this status of insurgency makes unnecessary much of the earlier diplomatic circumlocution prevailing between the state divided by domestic strife and foreign states and makes it possible for states to conduct negotiations with much less liability to misunderstandings. This is particularly evident in the diplomatic correspondence of late years. The tendency to depart from or to give special interpretations to the principles ordinarily governing the recognition of belligerency is much less, because when a status of insurgency is admitted many of the domestic reasons for such recognition may disappear and the formal recognition need only take place when the international relations warrant such action. The admission of insurgency is the admission of an easily discovered material fact. The recognition of belligerency involves not only a recognition of a fact, but also questions of policy touching many other considerations than those consequent upon the simple existence of hostilities.

GEORGE GRAFTON WILSON.

THE DOCTRINE OF CONTINUOUS VOYAGES¹

The doctrine of continuous voyages was developed by the English courts to defeat the devices by which American merchantmen endeavored to avoid the rule denying to neutrals in time of war the right to engage in a commerce from which they were excluded in time of peace. Under the system of colonial monopoly which then prevailed the trade with colonial possessions was confined to the ships of the home country. Colonists were regarded as the property of the mother country and as existing exclusively for her use and benefit. They were expected to supply markets for her manufactured goods and products for her markets. With respect to other countries colonies in a commercial sense had no existence. In theory, it has been said, the English colonies were no more to France than as if they were settlements in the mountains of the moon. For commercial purposes they were not on the same planet. Had they been annihilated it would have left no chasm in the commercial map of Germany. Had they been submerged the fact would have found its way into the chronicles of other countries as an interesting event but nothing more.

During the Seven Years' War the maritime supremacy of Great Britain enabled her to sweep French commerce from the seas and thus destroy her carrying trade with her colonies. Unable to maintain the monopoly of this trade, France attempted to retain a part of its benefits by transferring it to the care of the neutral Dutch. At first the Dutch merchants were granted licenses, or passes which authorized them to trade with the French colonies. But Great Britain, refusing to be thus deprived of the advantage she had gained, captured and condemned the ships upon the theory that they had forfeited their neutral character and had been in effect incorporated into the French marine.² The force of this contention was such that the French

¹ *The Immanuel*, 2 C. Rob. 186 (1799), *Scott's Cases*, 845, Sir Wm. Scott; 4 C. Rob. App. viii, n. 1; Anderson, *History of Commerce*, vol. i, p. 334.

² *Brymer v. Atkins*, 1 H. Black. 165, 191, Lord Loughborough. In *Berens v. Rucker* 1 W. Black. 314, Lord Mansfield said: "The rule is that if a neutral ship trades to a

government ceased to issue the licenses and thereafter threw the trade open to the Dutch without restrictions. The British, however, continued to make prizes of the vessels and to condemn them on the ground that the trade was virtually French.

In the closing years of the eighteenth century the British prize courts announced the general rule that a trade not open to neutrals in time of peace cannot be pursued by them in time of war, and asserted that the principle had been applied as the basis for the condemnation of the Dutch ships during the war of 1756. It is more than probable that this famous doctrine was an afterthought and that it should be known as the rule of the war of 1793.³ Great Britain conceding that neutrals might continue their customary trade,⁴ now denied their right to enter upon a traffic which she claimed was a direct interference with her maritime rights and which enabled the colonies to maintain themselves when they otherwise would have fallen into her possession as the natural result of successful belligerent operations. It was argued that

French Colony with all the privileges of a French ship and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so, if she has only French produce on board, without taking it in at a French port: for it may be purchased of neutrals."

³ Duer, *Mar. Ins.*, vol. i, p. 762, n. 1; Madison's *Examination of British Claims*; Madison's *Works*, vol. 2, p. 226; Wheaton's *Note on the Rule of the War of 1756*, 1 Wheat. (U. S.) App., p. 507; Pinckney's review of the British proceedings in the *Memorial of the Baltimore Merchants*, Wheaton's *Life of Pinckney*, p. 372; 1 Wheat. (U. S.) App., 506. For the British view, see *The Practice of the British Prize Courts with Reference to the Colonial Trade of the Enemy during the American War*, 6 C. Rob. App. iii. Jenkinson (Lord Liverpool), *Discourse on the Conduct of Great Britain with Respect to Neutral Nations*. This work was published in 1757, soon after the close of the war, and is apparently the only contemporaneous assertion of the principle or rule of the war of 1756.

Duer contends that the rule was not enforced in any form by the English admiralty prior to 1756, that as then enforced it was founded on a different principle from that subsequently adopted and that during and after the American war it was explicitly abandoned and over-ruled by the Lords of Appeal and by the House of Lords.

⁴ The claim of a right to prohibit all trade with an enemy had been definitely abandoned. See generally, Ward, *Rights and Duties of Belligerents*, p. 3; Jenkinson, *Discourse*, etc., p. 36; *War with America*, *Edinburgh Review* (Nov., 1812), vol. xx, p. 453; Hennebicq, *Principes de Droit Maritime Comparé*; Speech of Erskine on the Orders in Council, 10 Cobbett, *Parl. Deb.* 935. In the *Immanuel*, 2 C. Rob. 198, Scott's Cases, 845, Sir William Scott said: "The general rule is that the neutral has the right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable."

neutrals could not properly claim the right to intrude into a commerce which had been uniformly closed to them and which had been forced open merely by the pressure of war. When an enemy under an entire inability to supply her colonies and carry their products, opened the trade to neutrals it was not an act of will but of necessity that changed the system; the change was the direct and unavoidable consequence of the compulsion of war. It was the measure not of the desires of the mother country but of the force of her enemies.

"It is," said Sir William Scott,⁶ "an indubitable right of a belligerent to possess himself of such places as of any other possession of his enemy. This is his common right but he has the certain means of carrying such a right into effect if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party perfectly neutral to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent and to say, 'True it is, you have by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest and by sharing its benefits, prevent its progress.' "

This rule, which was asserted to be the converse of the general principle that a neutral is entitled to continue his customary trade with the enemy during the war, was enforced by England throughout the period of the Napoleonic wars. Its soundness was denied by neutrals and the right to carry on a trade which had been closed during peace, formed one of the principles of the Armed Neutrality League of 1780. During the war between England and her colonies the so-called rule of the war of 1756 was not asserted by England and the Americans now claimed that if it had ever existed as a principle of international law, it had, through the acquiescence of the maritime powers ceased to have any vital force. But it is probable that Great Britain never consciously abandoned the principle as it appears to have been occasionally asserted and enforced.

During the same period France announced that she had abandoned the system of monopoly and meant thereafter to throw open her entire colonial trade to the world. It is impossible to determine how far

⁶ The *Immanuel*, 2 C. Rob. 186, Scott's Cas. 845.

this action of France and the apparent acquiescence of Great Britain during the American war was due to the prevalence of new ideas as to the proper policy of nations. It is certain that the public mind was undergoing change. Adam Smith was earnestly advocating the policy of entire freedom for the colonial trade and his views were accepted by many persons high in official life. In France similar sentiments were sedulously cultivated by Mirabeau and the Economists. The inference that the change was due to the acceptance of the new ideas which were prevalent, is strengthened by the fact that numerous treaties were entered into about this time which threw open the colonial trade generally to all nations.⁶ But Great Britain chose to regard the action of France as having been taken in contemplation of approaching war and refused to relax the rule or abandon what she claimed to be her belligerent rights.⁷ These rights, as she defined them, were enforced with great strictness and numerous extensions against American commerce. The American merchantmen bitterly complained that they had been encouraged to engage in the trade and their ships then suddenly seized and condemned through the unfair revival of an ancient and obsolete rule.⁸ There followed a period of fierce belligerency during which Great Britain and France struck blindly at each other in utter disregard of the rights of neutrals. No attempt will now be made by anyone to justify the prohibitions and restrictions which were during this period imposed upon neutral commerce. Both belligerents presumed to dictate the trade in which neutrals might engage. The Americans claimed that the so-called rule of the war of 1756 had been abandoned; that France no longer claimed a monopoly of her colonial trade; and that with the consent of Great Britain they had built up a trade with the French colonies which they were entitled to continue during the war under the principles which had long been accepted by maritime powers. They denied that the rule had ever been established as a principle of international law, and asserted the right to trade to and from all ports not blockaded and in all articles not contraband, although the trade had not been open to them in time

⁶ See the treaties in Manning, *Law of Nations*, p. 198.

⁷ See the statement of the Lord Chancellor in the *Whitemina* in the Court of Appeals (1801), 4 C. Rob., App. xi.

⁸ Henry Adams, *History of the United States*, vol. iii, p. 47.

of peace. In this they were vigorously and consistently supported by the government of the United States. It was insisted that the right of an independent power to treat in times of peace with every other nation for leave to trade with its colonies and to enter into any trade whether old or new was not in itself a violation of neutrality; that one state had nothing to do with the circumstances which induced another state to open its ports; and that the trade must have a direct reference to the hostile efforts of the belligerents like dealing in contraband in order to render it a breach of neutrality.⁹

The force of the British argument in favor of the rule of the war of 1756, especially as applied to the colonial trade, seems to have appealed very strongly to many Americans. Chief Justice Marshall declined to express an opinion as to the correctness of the principle.¹⁰ Chancellor Kent thought that it might be fairly considered open to discussion, but that it was possible that if the United States should attain great maritime power and influence her people might be induced to feel more sensibly the weight of the arguments of foreign jurists and of the policy and equity of the rule.¹¹ Judge Story expressed himself as clearly satisfied that the colonial trade between the mother country and the colonies cannot be thrown open merely in time of war.¹² Wheaton expresses no definite opinion as to the soundness of the principle.¹³ It never met with the approval of continental writers,¹⁴

⁹ Monroe to Lord Mulgrave, Sept. 23, 1805, Madison's Examination of British Doctrine, etc.; Pinckney's Memorial to Congress from the Merchants of Baltimore, 1 Wheat. (U. S.), App., p. 507; Wheaton's Life of Pinckney, p. 72; Monroe to Madison, Aug. 20, 1805; State Papers, vol. iii, 105.

¹⁰ The *Commercen*, 1 Wheaton (U. S.) 398.

¹¹ Kent's Commentaries, vol. i (12th ed.), p. 84.

¹² Story, Life and Letters of Joseph Story, vol. i, p. 287.

¹³ Wheaton, Elements Int. Law (Dana's ed.), pt. iv, chap. 3, §27.

¹⁴ Bluntschli, Le Droit Int. Codifié, §§799, 800. See Calvo, Le Droit Int., tom iv, §2410.

"La règle de 1756 a été déclarée contraire aux principes internationaux par tous les publicistes modernes de quelque autorité en Allemagne et en France, par Bluntschli, Gessner, Geffcken, Kalterborn, Perels, De Boeck, Hautefeuille, Ortolan, par Calvo, par Wheaton, etc." Bonfils, Man. de Droit Int. Pub. (4 ed. Fauchille), §1534, p. 822 (1905).

"Néanmoins, cette prétention est purement arbitraire; se livrer à un commerce inoffensif qu'un des belligérants permet, n'est pas un manque d'impartialité, et c'est tout aussi peu une immixtion dans les hostilités. C'est ce commerce des colonies qui a donné naissance à la théorie de la continuité de voyage." (Geffcken's Heffter, Le Droit Int., §166 note.)

although Hübner, the especial champion of neutral rights, hesitated to claim the right to engage during a war in the colonial trade of a belligerent.

"This trade," says he,¹⁵ "may perhaps be considered unlawful, contrary to neutrality and constituting a direct interference in the war since neutral nations are not permitted to carry it on in times of peace. It is only open to them in time of war and on account of the war. On the establishment of peace they are again excluded from it so that the commerce of neutrals with the colonies of a state at war appears to be subject to the rigorous law of war." Nevertheless he ingenuously adds, "I do not perceive why neutral states ought to refuse themselves so considerable an advantage provided they abstain from furnishing the enemy's colonies with articles prohibited in times of war."¹⁶

Gessner says that it has been declared contrary to international principles by every jurist of repute in France and Germany.¹⁷ English jurists almost without exception asserted that the rule was an established principle of international law, and Manning considered it one of the most reasonable that a belligerent could assert.¹⁸ Hall, however, admits that it cannot be said to have been sanctioned by sufficient usage to render further debate unnecessary and that it is not easy to find a satisfactory answer to the arguments which may be urged on behalf of the right of neutrals to seize an occasion for extending their general commerce.¹⁹

The change in the colonial system and the provision of the declaration of Paris of 1856 that enemy's goods not contraband are not subject to capture under a neutral flag, has deprived the rule of the war of 1756 of much of its former importance. But no reason is apparent why it may not be revived at any time should conditions arise which in the opinion of a maritime belligerent would justify such action. All

¹⁵ *De La Saisie des Batiments Neutres*, tom. i, chap. 4, §6 (1759). The author of this work was sent by the Danish government to protest against the condemnation of the Dutch ships engaged in the trade with the French colonies. This book was the result of his mission. As to the author's attitude toward the claims of neutrals and belligerents, see Valin, *Traité des Prises*, chap. v, §5.

¹⁶ For comments upon this passage, see Phillimore, *Int. Law*, vol. iii, §221; Manning, *Law of Nations*, 199, 200.

¹⁷ Gessner, *Le Droit des Neutres*, pp. 266, 275. See Rivier, *Principes du Droit des Gens*, tom. 2, p. 411.

¹⁸ Manning, *Law of Nations*, p. 198.

¹⁹ Hall, *Int. Law* (4th ed.), p. 642.

the great powers have not given their adherence to the declaration of Paris and nations still generally exclude foreign ships from participation in their coasting trade.²⁰

The rule of maritime law, as enforced by Great Britain during the period under consideration, permitted neutrals to continue their customary trade during a war, but forbade them to engage in a trade from which they had been excluded in time of peace. She conceded to the neutral the right to import the products of the enemy's colonies into a neutral country and to export the goods of a neutral country other than contraband, to any port of the enemy which was not blockaded. The inevitable result of this condition was the importation of colonial goods into the country and their carriage from there to the belligerent. The law, according to the British view, contemplated two distinct voyages and the efforts of the American traders to engage in the forbidden commerce by means of alleged colorable importations into American ports was met by the assertion that where the importation into the neutral country was not in good faith the voyage from the colonial port to the belligerent was in law but one voyage and the ship was therefore subject to capture at any time after its departure from the neutral port. The voyage from the neutral port was not a new and distinct voyage but a continuation of the original voyage by which the goods had been imported and the entire voyage, although circuitous, was as illegal as if the neutral port had been entirely omitted.

²⁰ "Nor is it easy," says Hall, "to see that the question has necessarily lost its importance to the degree which is sometimes thought. The more widely the doctrine is acted upon, that enemy's goods are protected by a neutral vessel the more necessary it is to determine whether it ought to be governed in a particular case by exceptional considerations." (Int. Law (4 ed.), p. 663.)

"The importance of the rule—vindicated again and again, as it was by Sir Wm. Scott—has been vastly decreased by the adoption in the declaration of Paris of the principle of the freedom in all cases of the neutral flag. But the neutral flag cannot save the blockade runner or the contraband trader; though the operation of the rule of 1756 is minimized, the principle is sound. Neutral trading now as always is subjected to the over-riding condition of abstention from active assistance of a belligerent; and if in the forgotten corners of the earth there be any commercial operation which is forbidden to foreigners in time of peace, these foreigners can have no sound ground for complaint should the opposing belligerent deny in time of war the privilege which the home state would, in the hour of its exigency, now accord." (Walker, Science of Int. Law, p. 261.)

Other writers regard the principle as dead and buried.

It has been claimed that the theory of continuous voyages was first suggested by James Stephen, in the celebrated pamphlet, entitled *War in Disguise*.²¹ This publication undoubtedly had some influence upon the conduct of Great Britain but it was not published until 1805, and the theory of continuous voyages was applied by Sir William Scott as early as the year 1800. It is interesting to note that it was first applied in favor of a neutral for the protection of a cargo which had gone from the neutral port of Hamburg to the belligerent port of Bordeaux and from there to the French port of San Domingo. The ship was captured on the run from Bordeaux to San Domingo and the captor contended that by touching at Bordeaux with an entry and a form of importation, the goods were incorporated into the French commerce and should thereafter be considered as being carried from one French port to another. Sir William Scott declined to take this view and said:²²

I incline to think that this would be much too rigorous an application of principles rather belonging to the revenue law of this kingdom—a system of law having little in common with the general prize law of nations—and that these goods are entitled to be considered as coming from Hamburg, the original port of shipment.

The important and difficult question to be determined in all the cases in which the doctrine was applied was whether the importation into the neutral country had been made in good faith for the purpose of adding the goods to the common stock of the country, or was merely colorable and intended to conceal an original design of exportation to the belligerent country.

"It is certainly true,"²³ said Sir William Scott, "that a continued voyage from the colony of the enemy to the mother country to any other ports but those of the country to which the vessel belongs, will subject the cargo to confiscation; and the only point which the court has to decide is whether the voyage in question is to be considered as a continued voyage or not. It is a question in its nature subject to very considerable difficulties in particular cases; and one on which the court must exercise its judgment with great caution on the special circumstances which com-

²¹ Leslie Stephen, *Life of J. F. Stephen*, p. 19.

²² *The Immanuel*, 2 C. Rob. 186, Scott's Cases, 845. See also an article in *London Quarterly Rev.*, vol. vii, p. 6; Lyman's *Diplomacy of the U. S.*, vol. ii, chap. 1; Wharton, *Int. Law Dig.*, vol. iii, §388, p. 501.

²³ *The Maria*, 5 C. Rob. 365 (1805).

pose the substance of each case, and with great care not to attribute more weight to any particular fact than what it justly demands."

The nature and sufficiency of the evidence required to show good faith importation into a country was first considered in the case of the *Polly*,²⁴ an American ship seized while on the voyage from the neutral port of Marblehead to a belligerent port of Spain. The goods had been brought from the port of Havana in a Spanish colony in the same vessel and on account of the same owners and had been landed at Marblehead while the ship was undergoing repairs. The duties had been paid to the United States but the captors contended that these facts were not sufficient to break the continuity of the voyage from Havana to Spain. To this Sir William Scott replied that an American had an undoubted right to import the produce of the Spanish colonies for his own use into his own country, and after he had imported it in good faith was at liberty to carry it on to the general commerce of Europe. Answering the contention that the landing of the goods and the payment of the duties were not sufficient evidence of good faith, the learned judge said:

If these *criteria* are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid.

The evidence was held sufficient to show *bona fide* the importation and the cargo and the vessel were restored to the owners.

The American merchants understood from this decision that the landing of the goods and the payment of the duties at the neutral port would be accepted by the English prize courts as conclusive evidence that the continuity of the voyage had been broken. In reliance upon this understanding they engaged largely in the trade with the Spanish and French colonies and evidently treated the proceedings in the neutral port as a mere formality which imposed expense and trouble but did not otherwise interfere with the trade. Their point of view was radically different from that of the British government. They considered the trade as legitimate and the requirement of importation into a neutral port as a restriction wrongfully imposed by Great Britain. The British, on the other hand, regarded the trade as illegal and the attempt of the American traders to engage in it as improper and in

²⁴ The *Polly*, 2 C. Rob. 361 (1800).

both instances fraudulent. Upon this theory the attempt to carry the products of the colonies from a colonial port to the mother country was illegal and their passage through a neutral port by compliance with the mere forms of importation was a fraudulent attempt to do by indirection what was forbidden to be done directly.

In December, 1805, the lords of appeal held in the *Essex*,²⁵ that while the landing of the goods and the payment of the duties was evidence of importation it was not conclusive evidence; that the original intention of the importer to transship and export the colonial produce was the test of the continuity of the voyage and that this intention was to be ascertained from all the attending circumstances. Among these the landing of the goods and the payment of the duties had great probative value, but like other facts they might be merely colorable and designed to give a false appearance of importation where none was in fact intended. This decision struck a fatal blow at American commerce and it was freely charged that a deliberate trap had been laid into which American vessels had been induced to enter under the belief that they were protected upon compliance with the requirements of the decision rendered five years before in the case of the *Polly*. In the famous case of the *William*,²⁶ Sir William Grant, in delivering the opinion of the court of appeals, reviewed the former cases and proceeded to show that the Americans had no just ground for assuming that the court had held that the landing of the goods and the payment of the duties would be accepted as conclusive evidence of good faith importation into the country. There is no doubt but that many American merchants had entered upon this trade in good faith reliance

²⁵ The *Essex*, 5 C. Rob. 369 (1805); Duer, Mar. Ins., vol. i, p. 726.

²⁶ The *William*, 5 C. Rob. 395 (1806); Scott's Cas. 848. See also the statement of the doctrine in the *Thomyris*, Edwards 17. The cases in which the doctrine was applied are reviewed in Wildman's Int. Law, vol. 2, p. 65, *et seq.* In the *Bermuda*, 3 Wall (U. S.), 514, 554, Chief Justice Chase said that Sir William Grant in the *William* established the rule which has never been shaken that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention formed either at the time of the original shipment or afterward to send the goods forward to an unlawful destination the continuity of the voyage will not be broken as to the cargo by any transaction at the intermediate port. See also Opinions of the Attorneys-General of the U. S., vol. i, pp. 359-362, 394-396. Atty. Gen. Wirt, while condemning the rule, approves as just in the abstract, the English principle of the continuity of voyages.

upon their construction of the earlier decision. But it is clear that there was nothing in the decision which was inconsistent with the rule applied in the case of the *William*.

In the course of the opinion in the *William*, Sir William Grant said that the act of shifting the cargo from the ship to the shore and from the shore back to the ship did not necessarily amount to the termination of the voyage and the commencement of another. It might be wholly unconnected with any importation in the place where it was done. Suppose the landing to be merely for the purpose of airing or drying the goods or of repairing the ship, would any one think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading and that he lands the cargo purely and solely for the purpose to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible but when it is discovered it is according to the truth and not according to the fiction that we are to give the transaction its character and denomination. If the voyage from the place of lading be not really ended it matters not by what acts the party may have evinced his desire of making it appear to have ended. That these acts have been attended with trouble and expense cannot alter their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done but if the evasive purpose is admitted or proved a court can never be bound to accept as a substitute for the observance of the law the means which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended and the colorable importation which is to give it the appearance of being ended, there must necessarily be great resemblance. The acts to be done must be almost entirely the same but there is this difference between them. The landing of the cargo, the entry at the custom house and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of

the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies which have no natural connection with the purpose of sending on the cargo to another market and which, therefore, would never be resorted to by a person entertaining that purpose except with the view of giving to the voyage which he had resolved to continue, the appearance of being broken by an importation which he has resolved not really to make.

As the American merchants were frequently attempting to evade the rule which forbade them to engage in this trade it was inevitable that the application of this doctrine should often result in the condemnation of their property. Reading the decisions of the English prize courts more than a century after the passions of the time have subsided, it must be conceded that the law was usually applied with reasonable fairness and judicial discrimination. But as the American merchants never admitted the validity of the rule which forbade them to engage in the trade they naturally never acquiesced in the correctness and justice of the decisions.

The theory of continuous voyages was thus developed and first applied in cases which grew out of the attempts of neutrals to engage in a trade which had been closed to them in time of peace and which was therefore forbidden in time of war. But no good reason has ever been given why the principle was not applicable to any voyage undertaken in violation of law. The theory is applicable when the object which the neutral is seeking to accomplish is forbidden. When it is attempted by resorting to several short voyages extending to the aggregate from A to C to carry goods from A to C which the law forbids to be carried from A to C, the several nominal voyages are treated in law as one continuous voyage from the port of departure to the port of ulterior destination. In the eye of the law, the entity is the chain and not one of the links of which it is composed. The different stages are fused into one voyage, the links of the chain are united and called a chain instead of a number of links. The ships were captured after they sailed from the neutral toward the belligerent port. But the British courts made the intention of the trader, when he left the initial belligerent port, manifested by the act of sailing and evidenced by the subsequent conduct, the test of the legality of the voyage. If the intention was to go to the neutral port B and there deposit the cargo so

that it would be incorporated with the goods of the neutral country, well and good. But if the intention was to go to C for the market and realizing that if this fact was known the goods would be liable to capture from the time of leaving A, he went by way of B for the purpose of concealing the fact that the true destination from the first was C, the voyage was illegal from the first and the goods subject to capture notwithstanding the observance of certain formulae at the intermediate neutral port. If the doctrine itself is sound it applies to any voyage from A to C undertaken for a prohibited purpose. The early cases decided by the English courts dealt with attempts to engage in a prohibited colonial trade, but there is no reason for assuming that it would not have been applied to any other illegal trade. In fact, the case of the *Eagle*, decided May 10, 1803, shows that Sir William Scott regarded the doctrine as applicable to the carriage of contraband goods. In the case of the *William*, Sir William Grant refers to the case of the *Eagle* with approval. The cargo of the *Eagle* was brought from Bilboa to Philadelphia, where it was landed and after being reloaded in the same ship, was proceeding to Havana. The condemnation in the court below proceeded on the ground that the cargo was contraband of war. The only question in the court of appeals was with regard to the continuity of the voyage. From Sir William Grant's comment on the case there can be no doubt that he as well as Lord Stowell regarded the doctrine of the continuity of voyages as applicable to vessels engaged in carrying contraband goods. Lord Stowell's statement in the *Imina*,⁷⁷ that a vessel carrying contraband can only be captured while "in the actual prosecution of a voyage to an enemy's port," is often cited as proof that he did not consider the doctrine of continuous voyages applicable to the carriage of contraband. But this is a matter of the meaning of words. Under the doctrine of the continuity of voyages there can be no condemnation unless it is proven that the ship is engaged in a *simulated* voyage to the neutral and an *actual* voyage to a belligerent port. Professor Westlake notes that Lord Stowell

is sometimes quoted as if in the case of the *Imina*, he had condemned the application of a corresponding principle to the carriage of contraband of war. What, however, he said, namely, that the contraband goods must be taken, "in the actual prosecution" of the voyage to the enemy's port, was said with reference to the point that the proceeds cannot be taken

The *Imina*, 3 C. Rob. 167; Scott's Cas. 776.

on the return voyage, and he was not thinking of the exact circumstances in which an enemy destination will be held actual.²⁸

The cases of the *Eagle* and the *Imina* may also be reconciled, if it is necessary, on the theory that the *Imina* was a case of a ship with a false destination.²⁹

Mr. Justice Story also considered the doctrine of continuous voyages as applicable to the carriage of contraband.

"But it is argued,"³⁰ he says, "that the doctrine [of contraband] cannot apply [to the present case] because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, we should be glad to see an authority which countenances the exemption from forfeiture even though the property of a neutral."

In the same opinion, he says:

But it is not the effect of a particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination, to a neutral port can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses.

The doctrine of continuous voyages was also recognized by the Supreme Court of the United States in a case which arose during the war between the United States and Mexico. The ship *Admittance* cleared from New Orleans for Honolulu with a cargo intended for sale

²⁸ Introduction to Takahashi's Int. Law during the Chino-Japanese War, p. xx. It is suggested that Lord Stowell did not regard a neutral destination of the ship as conclusive against the condemnation of contraband goods on board.

²⁹ In Smith & Sibley's Int. Law as interpreted during the Russo-Japanese War, p. 236, it is said: "It may, of course, be properly pointed out that the application of the doctrine of continuous voyages to the conveyance of contraband is hardly consistent with one of the best known of Lord Stowell's judgments, the *Imina*. But the case of the *Eagle* can be reconciled with even this last case, if it be treated as a case of a vessel with a false destination. There would appear to be considerable analogy between sailing under false papers from a neutral port to a belligerent port and sailing from a neutral (or belligerent) to a belligerent port via an interposed neutral port. There is the same fraud practiced on the other belligerent, and it is essential to recollect, as appears from Lord Stowell's judgments, that the ground of condemnation in the prize court of a belligerent is the fraud practiced on him under the neutral's flag."

³⁰ The *Commercen*, 1 Wheat. (U. S.) 382.

in a Mexican port. It was thus a case of illegal trading with the enemy and the fact that the goods were consigned to a party at a Mexican port was conclusive evidence of their ultimate destination. An attempt was made to show that the ship was bound for the neutral port of Honolulu but the court said that it appeared by the charter party that the interposition of the neutral port was not for the purpose of trade with, or transshipment at, the neutral port.

"Attempts have been made," said Mr. Justice Daniel, "to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation."²¹

During the Crimean War, France applied the doctrine of continuous voyages to the carriage of contraband goods.²² The Dutch ship, *Frau Howina*, was captured off Cape Rocca while on a voyage from Lisbon to the neutral port of Hamburg with a cargo of saltpeter described in the manifest and bills of lading simply as "goods." A hostile destination overland into Russia was inferred from various circumstances, among the most important of which was the fact that Hamburg was already overstocked with saltpeter and that there was no such local commercial demand there for a further supply of that necessary ingredient of gunpowder as to attract foreign traders. The ship was captured while on a voyage from one neutral port to another and the cargo was condemned because it appeared to the satisfaction of the court that it was destined by the owner from the first for, and was being carried to, a belligerent. As the real destination was shown to be Russia it was deemed immaterial whether the saltpeter was to be carried on by the ship to the Baltic or discharged at Hamburg and carried overland to Russia. It will be noted that the ship was captured before it arrived at the neutral port and the second stage of the carriage was to be either by water or land transportation.

During the Civil War the United States applied the doctrine for the

²¹ *Jecker v. Montgomery*, 18 How. (U.S.) 110. See also 18 How. (U.S.) 198. The idea that this case turned upon the construction of an act of Congress, and therefore "has nothing to do with the matter of continuous voyages" is without foundation. The point is that the court announced its adherence to the doctrine.

²² Calvo, *Le Droit Int.* (4 ed.), tom. v, §§1961, 2767, where the judgment is printed in full. See also *Revue de Droit Int.*, tom. xxi, p. 55.

purpose of preventing the carriage of contraband to the blockaded ports of the Southern Confederacy. By established British and American usage a blockade runner is subject to capture at any time after leaving its home port with the intention of running an existing and publicly proclaimed blockade.³³ The same rule applies to the carriage of contraband to a belligerent. In considering the Civil War cases it must be remembered that the entire coast of the Confederacy was blockaded, and that both blockade running and the carriage of contraband goods was involved in every attempt to carry goods of a contraband nature to that coast. In order to restrict the danger area, ships engaged in the forbidden trade adopted the plan of clearing for neutral ports conveniently near the southern coast and there transshipping the goods to neutral vessels, especially adapted for the hazardous work of entering a confederate port. The advantages of the system were obvious. If the vessel was not subject to capture until after it left a neutral port such as Nassau, the danger line was brought within a few miles of the coast of the belligerent. A small island near the coast of Florida, therefore, soon became the center of an important trade. Its harbor swarmed with innocent looking trading vessels and the United States government was asked to assume that they had no improper relations with other craft of race-horse type and notorious character which so frequently called at the port. The nature of the trade was notorious and it was commented upon by Lord Russell in the House of Lords and by Lord Lyons in a letter to Secretary Seward. It was in fact common knowledge that the entire trade was a gross manifest and palpable evasion of the recognized rules and requirements of the law of neutrality; that Nassau was a mere outpost for attack upon a friendly belligerent by theoretical neutrals; a rendezvous for vessels engaged in a forbidden trade. The greater part of the transactions were conducted by, or under the immediate supervision of, confederate agents. On May 3, 1862, Commodore Bullock, the confederate naval agent in Europe, wrote to Mason that Frazer, Trenholm & Co., the confederate financial and commercial agents in London:

say their ships are necessarily sailed under the British flag and the presence on board of any person known to have been in the confederate service would compromise their character.³⁴

³³ *The Adula*, 176 U. S. 361.

³⁴ Moore, *Int. Arb.*, vol. i, p. 580; *Int. Law Solutions* (Naval War Col.), 1901, p. 42.

On August 18, 1862, the government instructed the naval commanders of the United States that a ship was not to be seized

without a search carefully made so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents or to their ports directly or indirectly by transshipment, or otherwise violating the blockade.³⁵

About this time the American Minister in London gave to the British foreign office a list of vessels which were being prepared to engage in a trade with the Southern Confederacy in violation of the neutrality laws. All the vessels subsequently captured appeared upon this interesting list.

The *Dolphin*³⁶ was the first of a series of cases in which the doctrine of continuous voyages was applied. She was a steamer of apparent British ownership which was captured near Porto Rico, while ostensibly on a voyage from Liverpool to Nassau with a cargo composed in part of goods contraband if destined for a belligerent country. Both ship and cargo were condemned by the district court.

"The cutting up of the voyage into several parts," said Judge Marvin, "by the intervention or proposed intervention of several intermediate ports may render it more difficult for cruisers or prize courts to determine where the ultimate terminus is intended to be but it cannot make a voyage which in its nature is one, to become two or more voyages, nor make any of the parts of one entire voyage to become legal which would be illegal if not so divided."

The *Pearl*³⁷ was captured when about sixty miles from Nassau while on an ostensible voyage from Liverpool to Nassau. The district court was satisfied that the vessel was really on a voyage to Nassau and directed that the claimants of the vessel and the cargo should be allowed to produce further evidence touching the ownership of the vessel and cargo and the disposition to be made thereof after the arrival at Nassau. No additional evidence was taken under this order and the court directed the restitution of the ship and the cargo. On appeal the

³⁵ Official Records of the Union and Confederate Navies, Ser. 1, vol. i, p. 417. These instructions applied the doctrine in regard to captures which had been announced by the government of the United States at a very early date. On Feb. 1, 1782, the congress of the confederation declared it lawful to capture and condemn "all contraband goods, wares and merchandise to whatever nations belonging, although found in a neutral bottom, if destined for the use of an enemy."

³⁶ The *Dolphin*, 7 Fed. Cas. 864 (1863).

³⁷ The *Pearl*, 19 Fed. Cas. 54; affm. 5 Wall. (U. S.) 578.

Supreme Court of the United States reversed this decision and condemned both the ship and the cargo.

In the case of the *Stephen Hart*²² the principles involved received elaborate consideration. The schooner was captured on January 29, 1862, while off the coast of Florida about twenty-five miles from Key West and about eighty-five miles from Port Yeacos, Cuba. She was loaded with army supplies and was bound ostensibly from London to Cuba. The government was able to show by evidence which was practically conclusive that the cargo of contraband goods was when it left London destined for delivery to the confederates either directly by the *Stephen Hart* or through transshipment at Cardenas to another vessel; that the vessel and the cargo were equally involved in the forbidden transaction and that the papers of the vessel were simulated and fraudulent. The mate swore that he knew the real destination of the cargo if not the vessel herself was to one of the blockaded ports of the confederacy; that the port of Cardenas was to be used simply as an intermediate port of call and transshipment of the cargo; that the cargo should be there transshipped to a steamer better adapted for blockade running, and that at Cardenas he was to report to a confederate representative who would direct his future actions with reference to the schooner and the cargo. He also testified that he had been employed because of his especial knowledge of the southern coast. There were no invoices, no bills of lading and no manifests. The mate also told how he had met Yancey and other well known agents of the confederacy at the house of Isaac Campbell & Co., at London, and how he was at first employed to undertake a blockade running adventure on a steamer and subsequently transferred to the *Hart* nominally as mate but really in charge of the cargo. There was an entire absence of papers and circumstances to show that there was any intention to dispose of the cargo at Cardenas in the usual way of lawful commerce. The court carefully distinguished between the case of a simulated neutral destination and that of a vessel having an actual terminus at a neutral point. It was conceded that if the *Hart* was a neutral vessel engaged in carrying a cargo from an English port to Cardenas for the general purpose of trade commerce and sale at Cardenas without an actual ulterior destination to the belligerents neither vessel nor cargo,

²² The *Stephen Hart*, Blatchf. Prize Cas. 387.

although in its nature contraband, was subject to condemnation. But the mere fact that the vessel was documented for, and sailing upon a voyage from London to Cardenas could not be accepted as conclusive evidence of actual destination as such a limitation upon the inquiry would open very wide the door for fraud and evasion.

"The law," said Judge Betts, "seeks out the truth and never in any of its branches tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If a guilty intention that the contraband goods should reach the port of the enemy existed when such goods left their English port, that guilty intention could not be obliterated by the innocent intention of stopping at the neutral port on the way. If, in stopping at such port there be no intention to transship the cargo and if it is to proceed to the enemy's country in the same vessel in which it comes from England, of course there can be no purpose of neutral commerce at the neutral port by the sale of the cargo in its markets. The sole purpose of stopping at the neutral must then be merely to have upon the papers of the vessel an apparent neutral destination for the cargo. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy while the vessel in which it was brought from England does not proceed to a port of the enemy there is equally an absence of all lawful commerce at the neutral port. The only commerce carried on in such a case consists of the transportation of the contraband cargo from the English port to the enemy port as was intended when it left the English port. It was held that in all such cases the transportation or carriage of contraband goods is to be treated as a unit from the port of delivery to the enemy's country; that if any part of such voyage or transportation is unlawful it is all unlawful and the vessel and cargo are subject to capture as well before arrival at the neutral port at which she touched as on the voyage or transportation by sea from the neutral port to the port of the enemy.

The judgment of condemnation of ship and cargo was subsequently affirmed by the Supreme Court.³⁹

Another phase of the problem was presented by the case of the steamer *Circassian*,⁴⁰ which was captured while on an ostensible voyage from Bordeaux to Havana. No part of the cargo was contraband but the ship and cargo were condemned for an attempt to run the

³⁹ The *Hart*, 3 Wall. (U. S.) 559.

⁴⁰ The *Circassian*, 2 Wall. (U. S.) 135. Mr. Justice Nelson dissenting, on the ground that at the time of the capture of the ship the blockade of the port of New Orleans had been raised. The mixed commission, the American commissioner dissenting, subsequently awarded compensation to the owners. (Moore, Int. Arbs., vol. iv, 3911, 3920, 3922.)

blockade of New Orleans. It was held that evidence of such an intention might be collected from bills of lading, letters and papers found on board the vessel, acts and statements of the owners or hirers of the vessel, shippers of the cargo and their agents, and from the spoliation of papers at the time of the capture. The evidence showed that the *Circassian* was chartered at Paris by one Souprey as agent. The charter party contained a stipulation that the vessel should go to Havre or Bordeaux and after being laden, proceed with her cargo to Havana, Nassau or Bermuda, and thence to a port in America and, "run the blockade if so ordered by the owners or freighters." With the charter party there was a memorandum of an affreightment given to Bouvet, one of the shippers and signed, "For account and with authority of J. Souprey," which provided that, "M. J. Souprey engaged to execute the charter party of affreightment, that is to say, that the merchandise shall not be disembarked except at New Orleans and to this effect he engages to force the blockade." The bills of lading spoke of the ship as "loading at the port of Havana for orders" and the stipulation was to deliver the packages at

the said port of Havana there to receive orders for the final destination if any of said steamer and to deliver the same to Messrs. B. & Co., to their order, he and they paying no freight, in accordance with the terms of any charter party; which is to be considered the supreme law as regards the said steamer, the orders to be received for her at her final destination.

Letters found on board disclosed an intention to run the blockade and almost at the moment of capture the captain ordered the destruction of a package of letters which had been sent on board after the ship had cleared for Bordeaux. Their destruction was strong evidence against the ship and the cargo and as said by Chief Justice Chase, when taken in connection with other evidence, "irresistibly compels belief of guilty intent at the time of sailing and the time of capture." The Chief Justice also said:

We agree that if the ship had been going to Havana with an honest attempt to ascertain whether the blockade of New Orleans yet remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would have been subject to lawful capture. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage and its discontinuance was not expected. The vessel was chartered and her

cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable.

The case of the *Bermuda*⁴¹ was very fully and exhaustively discussed and received the fullest consideration of the Supreme Court. The ship had once run the blockade of the port of Savannah and returned safely to England. At Liverpool she was loaded with contraband goods under the directions of the confederate agents. The master was a citizen of South Carolina. The bills of lading required the goods to be delivered at Nassau "to order or assign." A light draught steamer known as the *Herald* was connected with the *Bermuda* as a tender. Before she reached Nassau the *Bermuda* was captured by a United States cruiser. At the time of the capture the master threw certain boxes and packages overboard and burned a bag supposed to contain letters.

"This spoliation," says Chief Justice Chase, "was one of unusual aggravation and warrants the most unfavorable inferences as to ownership, employment and destination."

It was held that when several ships are engaged successively in the same transaction of conveying a cargo to a blockaded belligerent post, or a ship is let by its owners for the first part of the voyage, with a view to the ulterior distribution of the cargo, or when a ship so let is carrying a contraband cargo to a belligerent port under circumstances of bad faith, the ship may be condemned. The facts and circumstances which satisfied the court that the *Bermuda* had left Liverpool with the intention of carrying contraband goods into a blockaded port of the confederacy must be found in the many pages of the record; they are too numerous to be here set forth.

The case of the *Peterhof*⁴² presented a phase of the doctrine which had been determined by the French court during the Crimean War. The vessel was bound for the neutral port of Matamoras on the Rio Grande in Mexico with a cargo which consisted in part of contraband articles intended for the use of the confederate army. The question of blockade was eliminated from the case. The district court condemned the ship and cargo but on appeal the Supreme Court released

⁴¹ The *Bermuda*, 3 Wall. (U. S.) 514; Moore Int. Law Dig., vol. vii, §1259.

⁴² The *Peterhof*, Blatchf. Prize Cas. 463, 5 Wall. (U. S.) 28

the ship and approved the condemnation of the cargo. The rights of neutrals were carefully guarded.

"While articles not contraband," said the court, "might be sent to Matamoras and beyond to the rebel regions where the communications were not interrupted by blockade, articles of a contraband nature destined in fact to a state in rebellion or for the use of their military forces were liable to capture although primarily destined for Matamoras. * * * It is true that even these goods if really intended for sale in the market of Matamoras would be free of liabilities; for contraband may be transported by neutrals to a neutral port if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles at least were destined for the use of the rebel forces then occupying Brownsville and other places in the vicinity. Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of the blockade is intended. The former when destined to the hostile country or to the actual military or naval use of the country whether blockaded or not."

In the cases of the *Science* and the *Volante*, ships captured while on the way to Matamoras, the Supreme Court at the same time decreed restitution of the cargoes because of the insufficiency of the evidence to prove an actual enemy destination.⁴³

The decision in the case of the *Springbok*⁴⁴ has attracted much attention and is doubtless less satisfactory upon the facts than any of the other cases of the series in which the same doctrine was applied. The bark *Springbok* sailed from London, December 8, 1862, and was captured September 3, 1863, when about 150 miles east of the port of Nassau. The district court of the United States for the southern district of New York condemned the vessel and cargo, but on appeal the Supreme Court of the United States reversed the decree as to the ship and affirmed it as to the cargo. The court was satisfied that the ship was in good faith bound for the neutral port of Nassau and was therefore not subject to condemnation. The ship's papers were also regular and showed that the voyage on which she was captured was from London to Nassau. There was no concealment or spoliation of any of the ship's papers. The owners of the ship were neutrals and did not appear to have any interest in the cargo nor was there sufficient

⁴³The *Volant*, 5 Wall. (U. S.) 179; the *Science*, 5 Wall. (U. S.) 178.

⁴⁴The *Springbok*, Blatchf. Prize Cas. 434 (1863).

proof that they had any knowledge of its unlawful destination. A portion of the cargo was general merchandise but a part consisted of articles especially adapted for military use and a still larger part was capable of being adapted for such use. The evidence was held to establish the fact that the ship was carrying contraband goods which had an ulterior but direct destination to a belligerent port and that before the capture the intention had been formed to run the blockade. As the entire coast was actually blockaded it does not seem to be material whether the intention to enter any particular blockaded port had been formed. The evidence is not very fully stated in the opinion of the Supreme Court but it is set forth in great detail and keenly analyzed and reviewed by Judge Betts, in the opinion filed by him in the United States District Court.

It appeared that among other things found in certain packages, the contents of which were not disclosed by the bills of lading, were 540 pairs of gray army blankets, 240 pairs of white blankets, 340 gross of brass navy buttons, marked C. S. N. (Confederate States Navy), 10 gross of army buttons marked A (artillery), 390 gross of army buttons marked I (infantry), 140 gross of army buttons marked C (cavalry), all stamped on the under side, "Isaac, Campbell & Co., 77 Jermyn St., London." There were also 8 cavalry sabers, having the British crown on their guards, 11 sword bayonets, 87 pairs of russet brogans and 47 pairs of cavalry boots. The bills of lading disclosed the contents of but 619 out of 2007 packages. The bills and the manifests made the cargo deliverable to order. The master was directed by his letter of instructions to report himself on his arrival at the neutral port to H, who would give him instructions as to the delivery of the cargo. The entire cargo was claimed to be owned by the firm of Isaac, Campbell & Co., and Thomas S. Begbie, of London. On the hearing in the district court the proof taken in the cases of the *Stephen Hart* and the *Gertrude* were invoked.⁴⁵ The *Hart* had been condemned on the ground that its contraband cargo had been sent from England

⁴⁵ The invocation of the proofs in the *Hart* and the *Gertrude* has been criticised. See Twiss, *Law Mag. and Rev.* (4 ser.) 1, quoting from the brief of Mr. Evarts, counsel for the claimants before the mixed commission. It was argued by counsel, when the *Springbok* was before the Supreme Court, that invocation was permissible only after further proof ordered. In reply it was said that no case decided that a decree would be reversed because invocation had been made on the original hearing. The

with an ostensible destination to Cuba but with a real destination to the enemy's country, by Isaac, Campbell & Co., the same persons who with Begbie claimed to own the cargo of the *Springbok*. The *Gertrude* had cleared from Greenock for Havana or Nassau and been captured while on an ostensible voyage to St. John's, New Brunswick. Her certificate of registry named Thomas F. Begbie as sole owner. She was captured while making for the harbor of Charlestown, South Carolina, with a cargo of contraband goods. A comparison of the cargoes showed very conclusively that the three ships had been loaded from the same general stock. Thus on the *Springbok* there were 18 bales of "army blankets, butternut color," each marked *A in a diamond* and bearing irregular numbers. On the *Gertrude* were found bales of army blankets each marked *A in a diamond* and so numbered as to supply the missing numbers of the series and show that they were a part of a stock of goods which had been shipped as one transaction on the different vessels. From the facts of common ownership and the character of the cargoes the inference was strongly suggested that the *Springbok* had the same destination which the court had found for the *Hart* and the *Gertrude*. In addition to the practice of invocation the court followed the universal practice of prize courts and took cognizance of the status of the claimants, who appeared before it for the purpose of learning whether they came with clean hands or whether they had been before engaged in a similar illegal traffic.⁴⁶ The court said:

That some other destination than Nassau was intended may be inferred from the fact that the consignment shown by the bills of lading and the manifest was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been made to any one at Nassau. It must also be taken as a negation that any such sale was intended to be made there. * * * We do

court admitted that the procedure was not strictly regular but held that the matter was within the lawful exercise of the discretion of the court. See Davis, *Les Tribunaux des Prises des États-Unis*. The British foreign office was of the opinion that these records were "properly invoked."

⁴⁶ The *Juffrow*, 1 C. Rob. 127; the *Argo*, 1 C. Rob. 158; the *Nancy*, 3 C. Rob. 122; the *Rosalie* and *Betty*, 2 C. Rob. 343; the *Experiment*, 8 Wheat. (U. S.) 261. Judge Betts also cited Mosely on Contraband, p. 99, for the rule that the known character of the owners and agents of a vessel as connected with the contraband trade is a circumstance to be considered in determining whether there is sufficient reason to doubt the regularity of the ship's papers as to justify the court in disregarding them.

not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband but for the purpose of ascertaining its real destination; for we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and contraband or not it must be condemned if destined to any rebel port, for all rebel ports were under blockade. * * * We cannot look at such a cargo as this and doubt that a considerable portion of it was going to the rebel states where alone it could be used; nor can we doubt that the whole cargo had one destination. Now if this cargo was not to be carried to its ultimate destination by the *Springbok* and the proof does not warrant us in saying that it was, the plan must have been to send it forward by transshipment and we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest and the letter of Speyer & Heywood as indicating this intention; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipments and that Begbie was owner of the *Gertrude* and engaged in the business of running the blockade. If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the *Gertrude*, in the harbor of Nassau, with undenied intent to run the blockade about the time when the arrival of the *Springbok* was expected there. * * * All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances but that no claim sworn to personally by either of the claimants has ever been filed. Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*; that the voyage from London to the blockaded port was as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation if captured during any part of that voyage attached to the cargo from the time of sailing.^a

The attitude of the British government with reference to these seizures has been misunderstood. When the correspondence between the two countries was published in 1900, it appeared that it at the time had found no reasons for questioning the correctness of the decision in any of the cases.^b It seems that the opinions and arguments of English counsel employed by the claimants have been published as though they were the official opinions of the law officers of the crown.

^a The *Springbok*, 5 Wall. (U. S.) 1 (1866).

^b Correspondence, Miscellaneous (1900), Nos. 1, 27, 28, 31, 33. See Hansard, 3 ser., vol. cxxx, cols. 1834-5. Debate in House of Lords, May 18, 1863.

On February 20, 1864, after the determination of the *Springbok* case in the court of original jurisdiction, Earl Russell informed Lord Lyons that her majesty's government had considered the judgment of Judge Betts and would not officially interfere in the matter; that the owners must be left to the usual and proper remedy by appeal. Lord Russell further declared that

a careful perusal of this elaborate and able judgment containing the reasons of the judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of the *Stephen Hart* and the *Gertrude* (which her majesty's government have now seen for the first time), in which the same parties were concerned, goes so far to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau, but was either destined merely to call there, or to be immediately transhipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. The complicity of the owners of the ship, with the design of the owners of the cargo, is to say the least, so probable on the evidence that there would be great difficulty in contending that this ship and cargo had not been rightly condemned.

After the case was finally disposed of by the Supreme Court, the owners of the cargo presented to Lord Stanley, who had become foreign secretary, a petition asking that the government demand from the United States compensation for the damages caused by the alleged illegal condemnation of their property. The petition was accompanied by the opinion of private counsel⁴⁰ for the claimants that the judgment rested upon grounds, many of which were inaccurate in fact and erroneous in principle. This petition and opinion were referred to the law officers of the crown and thereafter, on July 24, 1868, the foreign office announced that the government would not be justified in mak-

⁴⁰ Mr. Mellish, afterward Lord Mellish, and Sir Vernon Harcourt (*Historicus*). In this opinion it is said that "the Supreme Court have in their opinion justly stated that the real question upon which the condemnation must turn is the original destination of the cargo." Moore, *Int. Law. Dig.*, vol. vii, p. 723. In his juridical review of the *Springbok* case, Dr. Gessner states that the British foreign office shortly after the seizure of the bark *Springbok* laid the case before the law officers of the crown and were advised that the seizure was null and void.

This opinion is quoted in Wharton, *Int. Law Dig.*, vol. vi, §362, p. 394, and by Desjardin, 59 *Revue des Deux Mondes*, 218. A recent writer in the *Law Quart. Rev.*, vol. 17, lxx, p. 24 note, states that he has been unable to find any record of the opinion.

ing any claim for compensation. With reference to the objection to the inference drawn by the court from the fact that the bills of lading did not disclose the contents of the packages or name any consignee because this was the customary practice in that trade, it was stated that a practice which might be

perfectly regular in time of peace under the municipal regulations of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visits of belligerent cruisers.

The ship's manifest was equally silent.

"Having regard," said the foreign office, "to the very doubtful character of all trade ostensibly carried on at Nassau during the late war in the United States and to many other circumstances of suspicion before the court, her majesty's government are not disposed to consider the argument of the court on the point as otherwise than tenable."

Under all the circumstances and in the absence of evidence from the claimants as to what was to become of the goods after their arrival at Nassau, her majesty's government thought that

the court was entitled to draw the inference that the consignors of the goods intended to be parties to the immediate transport and importation of these goods into a blockaded port on their being taken out of the *Springbok*.

As to the reference in the opinions to the *Gertrude* and the statement of the claimants that the *Gertrude* did not arrive at Nassau until after the capture of the *Springbok*, it was said that she appeared to have been delayed but

when she did reach Nassau after the capture of the *Springbok* she took on board a contraband cargo, on which the marks and numbers corresponded to some extent with certain marks and numbers on many packages in the *Springbok* and she was captured and condemned without any attempt being made to resist such condemnation.

Nor did her majesty's government consider that the decisions in the cases of the *Peterhof* and the *Dolphin* called for any intervention. While not accepting as satisfactory all the reasons assigned by the court, Lord Russell was not

prepared to say that the decisions themselves under all the circumstances of the cases are not in harmony with the principles of the judgments of the English prize courts. With respect to the case of the *Pearl* her majesty's government considers that the course pursued by the judge was fair and equitable.

Claims for compensation for damages arising out of the condemnation of these vessels were presented to a commission which was created under the provisions of the treaty of Washington. The claimants were ably represented before this commission and it is not possible to conceive of any objections to the legality of the judgment which condemned the cargo of the *Springbok* which were not there urged with acuteness and force. The commission awarded damages for the detention of the ship but unanimously disallowed any claim for damages for the condemnation of the cargo.⁵⁰

The doctrine as applied by the prize courts of the United States has never since been questioned by Great Britain. But many distinguished jurists were of the opinion that it was an innovation upon the original doctrine and particularly objectionable when applied to the law of blockade. Sir Travers Twiss⁵¹ asserted that so severe an exposition of the law of blockade was not to be found in the reported judgments of the European prize courts and that it added a new terror to war. He thought that it might be presumed that the judges of the Supreme Court did not foresee the wide scope of interference with neutral commerce which what he called the doctrine of blockade by interpretation would authorize, and that they had overlooked the fact that no evidence can in the nature of the case be forthcoming in a ship's papers or in the cargo papers, to refute the suggestion of a possible reshipment of the cargo on board another vessel destined to another port after delivery at the port of primary destination. The judgment in his opinion also violated the rule of maritime prize law that the ship's manifest and the bills of lading are the best evidence of the ownership and destination of the cargo. Sir Robert Phillimore⁵² found it difficult to support the decision

of the majority of the Supreme Court of the United States in the case of the *Springbok*, that a cargo shipped for a neutral port can be condemned

⁵⁰ British and American Claims Commission; Art. xii of the treaty of Washington; Moore, *Int. Arbs.*, vol. iv, p. 3928; Hale's Report, p. 117; vol. 3, *For. Rel.*, 1873; Blue Book, North America, No. 2 (1874); Brief of Mr. Evarts, Department of State.

⁵¹ *Belligerent Rights on the High Seas since the Declaration of Paris (1884)*. This paper was read before the Antwerp meeting (1877) of the Association for the Reform and Codification of the Law of Nations, and is also printed in *Law Mag. and Rev.*, vol. iii (4th ser.), p. 12.

The statement that the opinion in the *Springbok* case was by a majority of the court is an error. There was no dissent.

⁵² Phillimore, *Int. Law*, vol. iii, p. 490.

on the ground that it was intended to transship it at the neutral port and forward it by another vessel to a blockaded port.

Sir Sherston Baker⁵³ believed that the rule announced by the court had inflicted a serious blow on neutral rights and was in conflict with the views generally expressed theretofore by the United States. Hall⁵⁴ objected to the decisions because the vessels were in his judgment condemned

not for an act, for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole, but on the mere suspicion of an intention to do an act. Between the grounds upon which these and the English cases were decided there is of course no analogy.

But the argument constructed upon the airy premise, "of course," was not satisfactory to other writers.

"In the administration of all law," said Sir Edward Creasy,⁵⁵ "international as well as municipal, the realities and not the sham are to be regarded. The artifice which is in fraud of the law is itself a breach of the law. Unquestionably there ought to be a very full and clear proof of the artifice being practiced as well as planned. The burden of proof necessarily lies on the captor who imputes liability to seizure, nay more,

⁵³ Halleck's Int. Law, vol. ii (Baker's ed.), p. 219. In a later work, entitled *First Steps in Int. Law*, p. 310, Baker says: "It is a most unfortunate decision * * * vessels are captured while on their way from one neutral port to another and were condemned not for what they had done, which was *prima facie* innocent, but on the suspicion of an intention to do an unlawful act."

⁵⁴ Hall, Int. Law, 4th ed., p. 695 note. "*Of course*, the analogy of 'continuous colonial voyages' is *nil ad rem*," says a recent writer in *Jour. of Soc. of Com. Leg.* (n. s.), vol vi, p. 204. Lawrence (Int. Law, p. 597) says: "Putting aside disputes as to fact, the statements of law involved in the decision are open to grave doubt. If a belligerent may capture a neutral vessel honestly intended for a neutral port, and condemn her cargo because he vaguely suspects it will be transferred to some vessel unknown to him and sent to some hostile destination also unknown to him, a new disability has been imposed upon neutral commerce. States at war will in future be able to establish what has well been called a blockade by interpretation of any neutral port situated near the coast of an enemy. * * * Its authority has been seriously impaired by this chorus of disapproval. The utmost that can be allowed is that, if the captors have clear and definite proof that the destination of the cargo is hostile while that of the vessel is neutral, the courts may separate between the two and condemn the former while releasing the latter. Further it is impossible to go without inflicting great injustice on neutral trade." As this distinction was made by the Supreme Court in the *Springbok* case, the force of the criticism is not apparent. For similar statements, see Walker, *Science of Inter. Law*, p. 514, and Walker's *Manual of Pub. Int. Law*, p. 209; Taylor Int. Law, § 683.

⁵⁵ Creasy, *First Platform of Int. Law*, p. 624.

neutral destination ought to be looked on as presumptive proof of the destination of the cargo and the evidence on behalf of the captors to outweigh such presumption ought to be very different in quality and amount from what was held sufficient in the case of the *Springbok*. But if full and clear evidence is adduced that the contraband was not destined for sale and consumption in the neutral markets, but that the direct and primary object of their shipment was to forward them to or for the enemy, then the belligerent against whom they were destined to be used has a right to protect himself by arresting and seizing the intended instruments of ill to him while they are on the seas which are the highways of all nations but the territories of none."

Prof. Montague Bernard⁴⁶ objected not so much to the rule as to the severe manner in which he believed it had been enforced. He admitted that it was probable that all through the war very few cargoes were really intended to be disposed of at Nassau, and that injustice would rarely be done by acting on the presumption that the business of southern traders or agents residing there was not so much to make purchases on the spot as to forward the transmission of goods from Europe. He thought that it must be admitted that while the rules which had been gradually worked out by the prize courts were not on the whole inequitable, their application had sometimes been severe. Excuses for this he found in the extreme facility with which the rules themselves might be evaded. Prize courts were incessantly struggling with artifices and contrivances which are traditional and resorted to in all maritime wars, artifices and contrivances as easy to practice as they are difficult to unmask—by which neutral trade is constantly struggling to escape the heavy pressure of war and elude its restraints. He recognized the danger, however, to neutral trade, in the tendency to infer ulterior destination from insufficient and unsatisfactory evidence.

There was also a difference of opinion among American writers.

⁴⁶ Bernard, *The Neutrality of Great Britain during the American Civil War*, p. 320. In the *British Manual of Naval Prizes* (1866), the editor, Mr. Lushington, after stating that in this volume the destination of the vessel had been treated as conclusive evidence of the destination of the goods, contrary to the claim of the belligerents, said: "Judged by principle the view of the belligerent seems correct. A neutral vessel which forwards munitions of war on their way to their ultimate destination to one of the belligerents is really aiding and abetting in the war and this on the high seas." The same statement of the rule appears in the *Naval Prize Manual* of 1888. But Professor Holland, the editor of the last edition, regards the rule as obsolete. See statement of Lord Salisbury, *infra*.

President Woolsey⁵⁷ believed that the American decisions were a natural extension of the English principle of continuous voyages as announced by Lord Stowell, but suggested the danger that the courts might infer the illegal intention from insufficient evidence. J. C. Bancroft Davis,⁵⁸ American minister in Berlin, published a defense of the decisions and the practice and procedure adopted by the American prize courts, and remarked that the fact that the United States has been a defender of neutral rights in the past does not require it to advocate and defend a fictitious neutrality. Dana,⁵⁹ writing before the final decision in the *Springbok* case, said that if the cargo is destined to be carried through a blockade, it can be captured at any stage of the voyage. A neutral destination will often be interposed in such cases with all the ceremonies of landing transshipment and sale as in the case of contraband and the same test and principles of reasoning apply to both. Dr. Wharton⁶⁰ believed that the decision of the case of the *Springbok* should not be adhered to because in his opinion it violated those principles of neutral rights for which the United States had always consistently contended. His principal objection was, however, to the application of the doctrine to the law of blockade.

As was to be anticipated the decided weight of continental opinion as expressed by writers on international law was against the soundness and policy of the American decisions. These writers had never accepted either the rule of the war of 1756 or the doctrine of continuous voyages as applied by the British prize courts and could not reasonably be expected to approve an application of the doctrine which seemed to impose further restrictions upon the claims of neutrals. The disapproval of the rule as applied to the law of blockade was almost universal as it was inconsistent with the French practice of condemnation only after a vessel had once been warned of the existence of the blockade by the blockading fleet. But some of the most distinguished continental writers found nothing particularly objectionable in the appli-

⁵⁷ Woolsey, *Int. Law* (6 ed.), p. 536.

⁵⁸ Davis, *Les Tribunaux de prises des États-Unis*, Paris (1878). See Snow, *Int. Law* (2d ed.), p. 160.

⁵⁹ Wheaton, *Int. Law* (Dana) §598, note 231. See also the pamphlet by Historicus on *The Nassau Trade*, pp. 33-40 (1863).

⁶⁰ Wharton, *Int. Law Dig.*, vol. iii, §363, p. 404. See also an article in the *Independent*, June 10, 1889, on Patches on the Constitution. Reprinted in the *Dip. Corres. of the Am. Rev.*, vol. i, p. xxvii.

cation of the doctrine of continuous voyages to the carriage of contraband. Calvo,⁶¹ who may be considered as belonging to the continental school of writers, reviews the case of the *Springbok* very fully and expresses approval of the doctrine of the case, although like many others he was not satisfied with the evidence. According to Fiore,⁶²

contraband goods destined for one belligerent may be seized by the other belligerent if found on a neutral ship sailing between neutral ports if it is plain that the intention was to supply the goods to the former belligerent. In this sense the voyages of such goods are continuous as they constitute an indivisible unity as links in the same chain. This by itself however would not justify the seizure of the vessel but only the seizure of such goods as are actually contraband.

Gessner⁶³ also condemned the decision in the *Springbok* case but approved the doctrine as applied to the carriage of a contraband.

"The capture," says he, "can be justified even if the destination is a neutral port if it can be proved beyond a doubt that the contraband of war is destined for the enemy."

Bluntschli⁶⁴ stated the rule clearly and definitely that if the ship or goods are sent to the destination of a neutral port only the better to

⁶¹ Calvo, *Le Droit Int.* (4 ed.), tom. v, p. 43, where the views of many writers are stated. "C'est la destination ennemie qui décide: En principe il n'y a pas de la contrebande entre ports neutres mais il ne faut pas qu'en observant la lettre de ce principe on en blesse l'esprit, * * * on ne peut donc, dans le cas de contrebande, rejeter l'application de la théorie de la continuité de voyage comme dans la question du blocus. La contrebande est soumise à la capture dès qu'elle a quitté le port neutre à destination d'un port ennemi, qu'elle soit expédiée directement ou par voie détournée; '*dolus circuitu non purgatur*.'" (Geffcken, Heffter (4th ed. French), p. 392 note 2.)

⁶² Fiore, *Le Droit Int.*, tom. iii, §1649, by Antoine.

⁶³ Gessner, *Rev. de Droit Int.*, tom. vii, p. 236. See Woolsey, *Int. Law*, p. 357, citing *Nord Deutsche Alleg. Zeit.* of Dec. 29/30 (1868). In *Le Droit des Neutres Sur Mer*, p. 137, Dr. Gessner says: "Le transport des articles de contrebande n'est permisible suivant les principes que nous croyons juste que lorsque le vaisseau neutre est saisi en pleine mer, et que la destination pour l'ennemi des marchandises qu'il porte ne fait l'objet d'aucun doute. Une fois la destination bien déterminée, il est parfaitement indifférent que le vaisseau neutre se rende dans un port neutre d'où la contrebande de guerre doit être transportée dans un port belligérant, ou que les destinataires prennent possession de la marchandise dans le port neutre. Le lieu de destination n'a aucune importance; tout dépend de la destination elle-même, du fait que la marchandise est, ou n'est pas, destinée à un belligérant; du fait que l'on ne peut pas déduire des circonstances qu'elle sera appliquée aux besoins de la guerre."

⁶⁴ "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la con-

come to the aid of the enemy, they are contraband of war and may legally be confiscated. Perels⁶⁵ agreed that when a ship laden with contraband goods is on a voyage from one neutral port to another, it does not follow that the destination is conclusive as to the innocence of the cargo. Others assert that the idea of contraband is not to be entertained in connection with a voyage from one neutral port to another and repudiate the doctrine of continuous voyages in its entirety.⁶⁶ The grounds upon which writers of this class place their objections to the doctrine, as applied in the American cases, are well stated by Fauchille, in his work upon the law of blockade.⁶⁷ After speaking of the origin of the doctrine he says:

This doctrine was pushed by the Supreme Court of the United States so as to make it sustain the seizure of a vessel between the port of original departure and an intermediate neutral port and this on the conjecture of an ulterior adventure being projected for the goods in question from such intermediate neutral port to a blockaded port. * * * The effect of this decision is to impose upon a voyage between two neutral ports the penalties which may be imposed on a voyage between a neutral and a belligerent port. The decision stands on the fiction that though the vessel in which the goods are to be carried is changed at the intermediate port, yet the voyage is the same; and the reason would

fiscation sera justifiée." Droit Int. Codifié (Lardy's ed., 1895, §813). Bluntschli condemned the doctrine applied to the law of blockade. See §835 note.

⁶⁵ Perels, *Das Internationale Oeffentliche Seerecht*, p. 259, French ed., p. 278.

⁶⁶ In a paper read before the International Law Association at the 1905 Session, Dr. Thomas Batys says: "One cannot feel satisfied with Pillet's permission to belligerents to contradict the ship's papers purporting to show a neutral destination, by evidence *ab extra*. Such a permission immediately renders nugatory the freedom which a neutral is formally accorded. Pillet, moreover, adopts the curious view that, if the destination of goods is a neutral port, they cannot be contraband, even if they are meant to go overland to the enemy; whilst if the immediate destination is a neutral port, but they are meant to be eventually carried on to a hostile one by sea, they are capable of condemnation. If he means that if they have a through bill of lading to the enemy's port they may be confiscated, there may be little objection to the proposition. Otherwise there seems no reason in the nature of things why a conjectural voyage by water should be any more taken into account than a conjectural voyage by land. (Lois de la Guerre, §§216, 217.) Pillet follows Gessner, Phillimore and Perels in his theoretically satisfactory but practically fatal concession, Desjardins does not seem to go so far; he allows the belligerent to make a capture when the ostensible neutral destination is a mere blind."

See *Théorie du Voyage Continue*. Paul Fauchille, *Rev. de Droit Int. et Pub.*, tom. iv, p. 297.

⁶⁷ Fauchille, *Du Blocus Maritime*, §335 ff.

apply no matter how many changes the goods might be subjected to or how many successive neutral ports they might pass through. But international law repudiates such fictions. International law being eminently law based on common sense, the fiction in the present case imposes on neutral commerce burdens irrationally onerous. It gives to belligerent cruisers power over a neutral port, greater and more arbitrary than they possessed in respect to belligerent ports since while neutrals can carry to non-blockaded ports objects contraband of war they cannot without risk of seizure carry the same objects to another neutral port.

In some instances the criticism has been intemperate and unreasonable and based upon inadequate knowledge of the facts.⁸⁸ Kleen states that the doctrine of the British prize courts was revived by the United States during the war of rebellion,

par des commandments ignorants et des juges qui entraînés par le chauvinisme de ce conflit acharné, refusaient aux Sudistes le droit des belligérent; et cela, en dépit de la désapprobation tant du gouvernement de Washington que des principales autorités scientifiques américaines.⁸⁹

⁸⁸ Remy (Théorie de la Continuité du Voyage, etc.) states that the case of the *Springbok* was decided by the Supreme Court of New York. Fiore is also a trifle vague as to the identity of the court. (Nouveau Droit Int. Pub. (Antoine), tom. iii, §§1648, 1649.)

⁸⁹ Kleen, *Lois et Usages de la Neutralité*, tom. i, p. 638 (1898). If there is any justification for this disparaging reference to the Supreme Court of the United States it must be found in the letter which it was claimed was written by Mr. Justice Nelson to William Beach Lawrence, in which the justice is said to have stated "that the Supreme Court was not familiar with the law of blockade at the time when the appeal in the case of the *Springbok* came before it, and that the minds of several of the judges were warped by patriotic sentiments and by resentment against England." The letter is printed in *Law Mag. and Rev.*, 4 ser., vol. iii, p. 31, and has been referred to by all who were dissatisfied with the decisions. See also *North Am. Rev.*, July-Aug., 1878, article by Wm. Beach on International Obligations. There is nothing remarkable possibly in the fact that a dissenting judge should feel that the majority of the court were ignorant of the principles of the law which they announced. Mr. Justice Nelson dissented in the case of the *Circassian* upon the ground that the blockade of New Orleans had been raised before the vessel was captured. He did not agree with the majority of the court as to what constituted a blockade, but he concurred with the other justices in all the decisions of the Supreme Court which announced and applied the doctrine of continuous voyages and continuous transport. It has been frequently assumed that he dissented from the opinion in the case of the *Springbok*. There were no dissenting opinions in any of the cases except as stated in the case of the *Circassian*.

As said by Judge Baldwin, in his inaugural address as President of the International Law Association, perhaps this particular criticism is sufficiently answered by similar ulings which have been made by the prize courts of France and Italy.

It is also remarkable that nearly all the critics persist in asserting that the American courts held that a mere *suspicion* of an *intention* to proceed ultimately to a belligerent destination justified the condemnation of the cargo or of the ship and the cargo.⁷⁰ No such rule is found in any of the decisions. It was held that the suspicion justified the detention and search of the ship and that the intention to carry the cargo to the belligerent must be proven like any other fact by competent and relevant evidence. The fact that the critic is of the opinion that the evidence was not sufficient to justify the conclusion at which the court arrived has little if any bearing upon the question of the correctness of the rules of law involved in the case. Nor was it held that the intention alone was a violation of law; the condemnation resulted from proof of a specific act done with an illegal intention. There was nothing novel in the rule. It had been enforced by Lord Stowell, approved by Judge Story, by the United States during the war with Mexico, and by the prize courts of France during the Crimean War. It is true that the principle was applied under new conditions, but an "innovation" of this character is familiar and does not strike English and American statesmen and jurists as a novelty. As said by Lord Stowell in the *Atalanta*:⁷¹

All law is resolved into general principles, the cases which may arise under new combinations of circumstances leading to an extended application of principles, ancient and recognized, by just corollaries may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken the practice is not *new* nor is it justly chargeable as an *innovation* on the ancient law when in fact the court does nothing more than apply old principles to new circumstances.

The British prize courts condemned ships which had been captured while on the run from the neutral port to the belligerent port;⁷² the

⁷⁰ "Ludicrous," "absurd" and "attenuated," used adjectively seem to be the favorite argument. See "Recrudescence of Belligerent Rights." Proceedings Int Law Assoc., 1905, p. 129.

⁷¹ The *Atalanta*, 6 C. Rob. 440, 458 (1808).

⁷² In the cases of the *Susan* and the *Hope* (the *Caroline*, 6 C. Rob., 641 note) neutral American vessels were condemned by Sir Wm. Scott for carrying on voyages from Bordeaux official dispatches destined to French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was especially employed by the French government. Nevertheless it was held that the transportation of the dispatches toward their belligerent destination was an unneutral and a prohibited service. (Noted in Moore, Int. Law Dig., vol. vii, p. 727.)

American courts condemned ships which had been captured while on the run from neutral port to the intermediate neutral port; with the intention to proceed to a belligerent port. Unless it is arbitrarily assumed that the ship is free from capture until it has left the intermediate neutral port because of the fact that its papers are regular in form, it is difficult to see that there is any difference in principle. If the voyage was illegal the noxious quality was imparted by the intention which was entertained at the time of the departure from the initial neutral port. When the capture was made after the ship or cargo had left the port of simulated destination the evidence of the original intention was furnished by what had been done at the intermediary port. If the goods had been incorporated into the common stock of the neutral country it was thus conclusively shown that any illegal intention which may have been entertained had been abandoned and hence no offense had been committed. The cargoes carried in the colonial trade were seldom contraband and were always going ostensibly to a neutral port where they were in demand in the ordinary course of trade. The difficulty in the way of proving the ultimate destination until after it was ascertained that the goods had been carried beyond the neutral port was thus ordinarily insuperable. But a cargo of arms and ammunition, bearing the significant initials of the confederacy, consigned to a confederate agent at a confederate port, or at an insignificant island thereby, carried on a ship with false and contradictory papers, was in itself evidence which could not properly be disregarded by any court which declined to close its eyes to facts and be imposed upon by a mere fiction.

The doctrine in the last analysis means simply that a person cannot be permitted to do by indirection what he is forbidden to do directly and that a fraudulent act is none the less fraudulent and objectionable because concealed beneath the forms of legality. The admitted principle is applied to facts as they are and not as they are made to appear to be. The doctrine does not rest upon a fiction; it looks beneath the fiction to the facts and if, as has been said, there is no place in international law for fictions, the doctrine should be accepted without further objection. A vessel sailing from A to C with a pretended destination to an intermediate destination at B claims the benefit of a fiction when it asserts that the run from A to B constitutes a complete voyage. The fact stripped of all pretense is that there is one continuous

voyage from A to C, although made circuitously with a fictitious termination at B.

It may be conceded that it is of the essence of the administration of prize law that a ship can only be condemned "out of her own mouth;" that in the first instance the case must be heard upon evidence found on the ship, such as papers, the testimony on oath of the master, officers and other persons on board at the time of the capture. If the papers are regular and nothing is found which casts suspicion upon their genuineness, the ship is entitled to proceed, although the cargo, if contraband and destined for a belligerent, may be condemned. But if the papers are incomplete, ambiguous, contradictory or fraudulent, or the sworn statements of the parties disclose suspicious circumstances, the court may resort to other sources for evidence of the truth. The general doctrines of the law of evidence as administered in the municipal courts is not applicable in prize courts. But it cannot be that any court is required to close its eyes to obvious facts and decline to look beneath a cover of fraud for the truth which lies there concealed. It cannot be necessary in order to maintain the freedom of the seas for the benefit of neutral trade and protect the rights of actual neutrals who are in good faith observing the obligations imposed by the laws of neutrality to construe the law for the special protection of persons who are secretly aiding one belligerent to the injury of the other.

But notwithstanding the protests of jurists, governments continued to recognize and enforce the doctrine of continuous voyages in connection of contraband goods. Thus in 1885 the French government claimed the rights to seize vessels carrying contraband goods to China while on a voyage from a neutral port to the English port of Hong-Kong.⁷³ So in 1895, during the war between Italy and Abyssinia the doctrine was applied to the carriage of contraband goods destined ostensibly to a neutral port but with an ultimate overland destination to a belligerent country. The facts bring this case directly within the doctrine of the *Peterhof* and the other Matamoras cases. The ship *Doelwijk*, with a cargo of arms and ammunition, anchored in the roadstead off Rotterdam and sailed therefrom with a crew signed for Kur-

⁷³ Geffcken, *Chine et le Droit Int.*, *Revue de Droit Int. et de Légis. Com.*, tom. xvii, p. 148.

rachee in the English Indies with an intermediate destination of Port Said for orders. The Italian government, acting upon information received from its foreign representatives and with the knowledge of the previous landing of arms at the neutral port of Djibouti, instructed its cruisers that if when the *Doelwijk* came out of the straits of Bab-el-Mandeb, she turned to the right toward the Gulf of Tadjoura instead of the left on the ordinary route to Kurrachee, she should be immediately searched and if evidence of a hostile destination was found, taken to Massoua and proceeded against in the prize courts. On the night of August 8, 1896, departing from Kurrachee, the *Doelwijk* proceeded toward Djibouti and was thereupon captured and taken to Massoua. Upon investigation it was found that the cargo was composed of rifles, cartridges, sabers and other munitions of war. The quarantine papers given the ship by the authorities at Port Said described her as a British vessel but the nationality papers, viséed on July 30, described her as a Dutch ship. The papers found on board also disclosed that the ship belonged to one Ruys, "armateur et directeur du *Lloyd* hollandais." The ship had been chartered March 13, 1896, by the firm of Lacarrière et Cie, to depart on March 17, 1896, with the condition that the captain should take his orders only from the charterer. It also appeared that while the ship's papers gave the destination as Kurrachee the bills of lading signed by the captain gave the destination as Port Said for orders. The bills of lading designated the arms as having been shipped by Ruys et Cie as agents but named no consignee, being consigned to order. No other bills of lading were found on board but the firm of Lacarrière produced others signed also by the captain which gave the destination as Djibouti. Certain correspondence between Ruys and the captain, showed that the goods were to be carried to Djibouti and that everything there was prepared for their disembarkment and reception. Ruys at Rotterdam made no attempt to conceal the fact that the ship was destined for Djibouti. The arms, which formed a part of the cargo were of an antique pattern and seemed especially adapted for the use of the Abyssinians. After full argument the prize court decided that both the ship and cargo were subject to condemnation on the ground that the ship was engaged in carrying contraband of war to Abyssinia by way of the neutral port of Djibouti. It was said that under the circumstances the destination of the cargo and not that of the ship determined the right to

condemn the cargo as contraband. The rule applied in the American cases was fully recognized by the Italian prize court, although the ship and cargo were ultimately restored to the owners on the ground that the war had come to an end before the condemnation had taken place.⁷⁴

As applied in this case the doctrine met with the approval of the Institute of International Law.⁷⁵

An incident which occurred during the war between China and Japan disclosed the views of the Japanese government.⁷⁶ Her cruisers searched the British mail steamer *Gallic* in the harbor of Yokohama for persons who were carrying to China explosive material intended to be used for the destruction of Japanese ships. At the time of the search the persons alleged to be on the way to serve in the Chinese army had disembarked and proceeded on another ship to Shanghai. But the search was continued for articles which they might have left on the vessel. The *Gallic* was at the time on a voyage from San Francisco to Hong-Kong by way of Yokohama. It appears that vessels belonging to the same company to which the *Gallic* belonged frequently called at the Chinese port of Amoy but there was no proof that the *Gallic* intended to do so on this voyage. The Japanese government justified the search of the British ship on the probability that it might call again at Amoy and that persons or goods on board were destined for China by way of Hong-Kong. The British government objected to the proceedings because the *Gallic* had no hostile destination and there was

⁷⁴ For the decision of the Italian prize court, see *Ruys v. Royal Exchange Assur. Co.*, 2 Com. Cas. 201, and *Journal de Droit Int. Privé*, pp. 850-878. *Archives Diplomatique*, tom. i, p. 81 (1897). See generally Brusa, *L'affaire de Doelwijk*, *Revue Générale de Droit Int. Pub.*, tom. iv, p. 157 (1897); Diena, *Le Judgment du Conseil des Prises d'Italie dans l'Affaire du Doelwijk*, *Journal du Droit Int. Privé*, tom. xxiv, pp. 268, 275 (1897); Despagnet, *Le Conflit entre Italie et Abyssinnia*, *Revue Gén. de Droit Int. et Privé*, tom. iv, p. 39; Remy, *Théorie de la Continuité du Voyage*, p. 62; Kleen, *Lois et Usages de la Neutralité*, tom. ii, p. 662; Bonfils, *Manuel de Droit Int. Pub.* (Fauchille), §1707; Pillet, *Lois Actuelles de la Guerre*, §216, p. 329; Fedozzi, *Revue de droit Int.*, tom. 29, p. 49 (1897).

⁷⁵ *Annuaire de l'Institute de Droit Int.*, tom. xv, p. 231.

⁷⁶ Takahaski, the legal adviser to the Japanese admiralty, cites the case of the *Hart* as "an established precedent," and remarks that, "Anyone with common sense can soon deduce that if Japan had admitted all neutral vessels to be exempt from the enforcement of belligerent rights simply because they were ostensibly going to Hong-Kong, which is in its geographical position actually a part of China, then all neutral vessels would have been exempt from capture even though they carried contraband of war." (*Int. Law During the Chino-Japanese War*, p. 62.)

no evidence of any intention to call at the Chinese port of Amoy. In reviewing this incident Professor Westlake, who had been one of the critics of the *Springbok* decision,⁷⁷ used the following language:

Goods on board a ship destined for a neutral port may be under orders from the owners to be forwarded thence to a belligerent port, army or navy, either by a further voyage of the same ship, or by transshipment or even by land carriage. Such goods are to reach the belligerent without the intervention of a new commercial transaction. In pursuance of the intention formed with regard to them by the persons who are their owners during the voyage to the neutral port. Therefore even during that voyage they had a belligerent destination although the ship which carried them may have only a neutral one.⁷⁸

The doctrine as applied in the American case of the *Peterhof*, the French case of the *Frau Howina*, and the Italian case of the *Doelwijk*, was approved by Great Britain during the Boer War of 1899.⁷⁹ Great Britain asserted the right to detain neutral vessels bound for the Portuguese port of Lorenzo Marquez when there was reason to believe that they were loaded with contraband goods destined overland to the Transvaal. The detention and search of the German ship *Bundesrath* led to a correspondence between the two governments, in which Lord Salisbury defended the seizure on principle and the authority of the American cases and cited Bluntschli in support of the right to capture contraband goods when being carried on a neutral ship to a neutral port with an ulterior destination beyond to a belligerent. Count Hatzfeldt countered by quoting from the British Naval Manual of Prize Law of 1866 the statement that the destination of the vessel is conclusive as to the destination of the goods on board. Lord Salisbury replied that the book was published as a convenient guide for her majesty's officers in the exercise of their duties, "but it has never been asserted, and cannot be admitted to be, an exhaustive or authoritative statement of the

⁷⁷ See *Revue de Droit Int.*, tom. vii, p. 259.

⁷⁸ Takahashi, *Int. Law*. During the Chino-Japanese War, Intro. Note by Prof. Westlake. Reprinted in *Law Quart. Rev.*, vol. xv, p. 3. In Professor Westlake's opinion the search of the *Gallic* could not be justified on the doctrines relating to contraband of war.

⁷⁹ Correspondence on the Seizure of the *Bundesrath*, South Africa, No. 1 (1900); The seizure of the *Bundesrath* by J. Dundas White, *Law Quar. Rev.*, vol. 17, lxv, p. 12; Contraband Goods and Neutral Ports, by E. L. de Hart, *Law Quar. Rev.*, vol. 17, lxvi, p. 193 (a reply to the foregoing article); Baty, *Int. Law in S. Africa*, pp. 1-44; Desjardins, *Rev. des Deux Mondes*, March, 1900, p. 61. *Int. Law Situations* (Pub. Naval War College), p. 79.

views of the lords commissioners." After further explaining away the embarrassing statement in the manual, Lord Salisbury said:

The directions in this manual which for practical purposes were sufficient in the case of wars such as have been waged by Great Britain in the past, are quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port.

Professor Holland defended this application of the doctrine of continuous transport as

an innovation which seems to be demanded by the conditions of modern commerce.⁸⁰

The German government claimed that Great Britain had no right to interfere with neutral goods while on the way from one neutral port to another and that the duty of preventing the transmission of contraband to the Transvaal rested upon the Portuguese government. It should be noted, however, that the Prussian regulations of 1864 regarding naval prizes provide that the hostile destination of the goods or the destination of the vessel to an enemy's port justifies her seizure.

After the capture of the *Doelwijk* by the Italian government the owners abandoned the ship and attempted to recover the insurance in the English courts and it was held that they were estopped by the decision of the Italian prize court upon the questions of fact.⁸¹ But in a similar action by the owners of the *Peterhof* the English court refused to be bound by the facts as found by the American court and used language which has been construed as condemning the legal ground upon which the Supreme Court of the United States rested its decision.⁸² Dr. Phillimore says that Chief Justice Erle, who decided the case of *Hobbes v. Henning*, is in accord with the Supreme Court of the United States upon the general doctrine, and Prof. Westlake says that the case has been represented, I think, erroneously as repudiating the doctrine of continuous voyages. * * * On the whole then no positive opinion is

⁸⁰ The Times, Jan. 3, 1900. The latest edition of the Manual of Naval Prize Law prepared by Professor Holland states the rule as follows, "The ostensible destination of a vessel is sometimes a neutral port while she is in reality intended after touching and even loading and colorably delivering over her cargo there to proceed with the same cargo to an enemy's port. In such a case the voyage is held to be continuous and the destination is held to be hostile throughout."

⁸¹ *Ruys v. Royal Exchange Co.*, 2 Com. Cas., 201; also (1890) 2 Q. B., 135.

⁸² *Hobbes v. Henning*, 17 C. B. (n. s.) 791.

to be found in *Hobbes v. Henning* on the doctrine of continuous voyages and the tendency of the court's observations is not unfavorable to it.⁸³

In the subsequent case *Seymour v. Insurance Company*,⁸⁴ the doctrine is clearly recognized and approved.

The reasonableness of the doctrine of continuous voyages as applied to modern conditions has thus led to its general acceptance by maritime states and by writers of high authority, such as Bluntschli, Gessner, Kleen, Fiore, Calvo, Bonfils, Westlake, Oppenheim, and others. At the session at Weisbaden in 1882, the Institute of International Law condemned the decision in the case of the *Springbok* in unsparing terms,⁸⁵ but this representative body of jurists of all nations finally adopted the American doctrine. At the meeting in Venice in 1896 the following rule was approved:

A destination for the enemy is presumed when the carriage of the goods is directed toward one of his ports or toward a neutral port which by evident proofs arising from incontestable facts is only a stage in a carriage to the enemy as the final object of the same commercial transaction.⁸⁶

This phase of the controversy may be considered as closed.

There are some serious objections to the doctrine as applied to the law of blockade. In the case of contraband the guilt attaches to the goods but in blockade running the ship is the vehicle of offense and the goods merely follow its fate. When the ship is in good faith bound to a neutral port and it is intended to there transship the goods and carry them to the blockaded ports in another vessel, the theory seems to break down and the doctrine of continuous voyages or of continuous transport can be applied only if we modify the old theory.⁸⁷

⁸³ Phillimore, *Int. Law*, vol. iii, p. 397; Westlake, *Law Quar. Rev.*, vol. xv, p. 28.

⁸⁴ 41 L. J. N. S. C. P. affm. in Exchequer Chamber, 42 L. J. N. S. C. P. 111 note.

⁸⁵ *Rev. de Droit Int.*, tom. xiv, p. 328 (1882). The conclusions of the committee are printed in Rivier, *Principes du droit des gens*, tom. 2, p. 433, in Moore, *Int. Law Dig.*, vol. vii, p. 731.

⁸⁶ La destination pour l'ennemi est présumée lorsque le transport va à l'un des ses ports, ou bien à un port neutre qui d'après des preuves évidentes et des fait incontestables n'est qu'un étape pour l'ennemi comme but final de la même opération commerciale." (*Annuaire de l'Institute de Droit Int.*, tom. xv, p. 231.)

⁸⁷ *Two Centuries of American Law*, p. 551, *International Law*, by Prof. T. S. Woolsey.

Otherwise the application of the doctrine is entirely consistent with the general principles of the law of blockade as understood and applied by Great Britain and the United States and approved by Prussia and Denmark, but inconsistent with the theory and practice of France, Italy, Spain and Sweden. The British and American practice subjects the ship to capture and condemnation from the time it sails for a port, the blockade of which has been diplomatically notified unless

the port from which the vessel sails is so distant from the seat of war as to justify her master in starting with a destination known to be blockaded, on the chance of finding that the blockade has been removed and should that not prove to be the case with the intention of changing her destination.⁸⁸

Under the French practice a ship has the right to proceed to the entrance of the blockaded port and there learn whether the blockade then exists. Special notice to each vessel duly endorsed on the ship's papers is necessary in addition to any public proclamation which may have been issued by the government.⁸⁹ The doctrine is, of course, inapplicable to the law of blockade if this rule is to be accepted,⁹⁰ but it is consistent with the British and American rule under which the neutral trader subjects his property to confiscation immediately upon sailing with a clear destination for a blockaded port. As the test of criminality is found in the intention, the entire proceedings from the time of sailing are open to investigation.⁹¹ The right to capture the ship at any time after it sails for the blockaded port presupposes the existence of a legal blockade and the necessity for this legal blockade is in nowise affected by the interposition of a neutral port for the

⁸⁸ Holland, *Prize Law*, §133; United States Naval Code, Art. 42; Taylor, *Int. Law*, p. 769; Oppenheim, *Int. Law*, vol. ii, p. 413; Bulmerincq, *Revue de Droit Int.*, tom. x, p. 240; the *Betsy*, 1 C. Rob. 34.

⁸⁹ Calvo, *Le Droit Int.*, tom. v, §2846, *et seq*; Pistoye & Duverdy, *Traité des Prises Maritimes*, tom. i, p. 370.

⁹⁰ Bonfils, *Manuel de droit Int. public* (4 ed.), §1665; De Boeck, *De la Propriété Privée*, §175; Geffcken, Heffter, *Le droit Int.* (4th ed. French), p. 379, note 9; Depuis, *Le Droit de la Guerre Maritime*, §194-5; Pillet, *Les Lois Actuelles de la Guerre*, §216.

⁹¹ Taylor, *Int. Law*, p. 680. The ship cannot be admitted to even approach the blockaded port for the purpose of inquiry. The *Irene*, 5 C. Rob. 390. For an extreme application of this principle, see the *Adula*, 176 U. S. 361, and the comments of the defeated counsel thereon in report of the Universal Congress of Lawyers and Jurists, 1904, pp. 248-250.

purpose of deception or convenience. The legal blockade must exist whether the ship is captured while on a direct or circuitous voyage to the blockaded port.

It may be unfortunate from the standpoint of jurisprudence that the decisions in the American cases failed to distinguish clearly between the application of the doctrine of continuous voyages to the carriage of contraband goods and the attempt to breach a blockade, but the facts determined the situation and American and English courts deal with cases as they arise upon the facts and are prone to allow abstract principles to take care of themselves. They are practical if not always scientific. The entire coast of the southern states was blockaded and every ship which attempted to carry contraband goods to the confederate ports was necessarily guilty also at some stage of the voyage of an attempt to run the blockade. Under these conditions the ships and cargoes might in some of the cases have been condemned upon either ground. The *Dolphin*, the *Hart* and the *Bermuda* were carrying contraband of war to a belligerent and were liable to condemnation without reference to the additional fact that it was necessary to run the blockade in order to deliver the cargo to the belligerents. The *Peterhof* and the *Springbok* were also carrying contraband and the cargoes were condemned and the ships released. As the doctrine of continuous voyages was properly applicable to the carriage of contraband goods the judgments entered in all these cases were correct regardless of the fact that the court included among the reasons for condemnation the additional fact that the vessels were engaged in blockade running.

In its present form the doctrine of continuity is applied to the continuous transportation of contraband goods over a previously determined route as well as to the continuous voyage of a ship. It seems to have been developed naturally and logically by the application of well settled rules of law to meet the difficulties arising out of new conditions.

CHARLES BURKE ELLIOTT.

NOTES ON SOVEREIGNTY IN A STATE¹

The following notes aim, in a tentative way, to discuss and analyze the source and nature of sovereignty in its relation to mankind, and to the institutions created and developed as a result of man's desire for social order and peace. The term notes excludes the idea of an exhaustive or comprehensive treatment of sovereignty; the sole purpose in view is to direct attention to the wide-reaching importance of the subject and to suggest a line of thought somewhat different from that usually followed by publicists.

In the various systems of philosophical theories of government, which have been given to the world since the human reason was emancipated by the revival of learning, sovereignty, with scarcely an exception has held a prominent place, and upon their conception of it all of the foremost thinkers since that time have rested their philosophic systems. The two great exceptions to this general practice are Montesquieu and Locke. The former neither defines nor treats of sovereignty; and the latter fails even to mention the word. The explanation of this apparently vital omission from their systems may be found in the ethical idealism of these philosophers, who exalted moral obligation to an actual force and gave to man's consciousness of right a determinate authority which is denied by historical experience. They dealt with what they conceived *ought to be* in human affairs, rather than what really is.

The other political philosophers preceding Montesquieu and Locke, such men as Johannes Althusius, Jean Bodin, Suarez, Hobbes and Spinoza, while often intermingling abstract right with strict legality, saw the necessity of recognizing sovereignty as an ever present factor in all phenomena of government, and, therefore, of introducing it into their systems. When Hume by the force of his logic discredited the

¹First Paper. The following works, referred to by author rather than title are: Austin: Principles of Jurisprudence, 5th ed., revised and edited by Robert Campbell, London, 1885. Bluntschli: Theory of the State, 3d ed. Burgess: Political Science and Comparative Constitutional Law, 2 vols. Dunning: History of Political Theories. Lawrence: Principles of International Law. Maine: Early History of Institutions.

"contract" theory of the source of governmental power which had swayed philosophic thought for a century and set in motion those doctrines that found fuller expression in the writings of Bentham and Austin, sovereignty again assumed the importance which it had in a measure lost through the influence of Locke and Montesquieu.³

To modern writers upon political philosophy, jurisprudence and law the subject of sovereignty has been one of recognized importance. Indeed, it has been to the great body of philosophic thought for the past three hundred years the persistent force which affects all the political relations of mankind. To the present-day philosopher, it is even more; it is the fundamental authority which controls, restrains and protects man as a member of society. In the advanced state of modern thought, it is irrational to consider origins or to trace the development of political institutions without admitting the existence and constant activity of sovereignty, and its potency in the creation, evolution, and expansion of such institutions. No problem of government can be proposed in which it is not an essential factor. No explanation of such terms as *liberty* and *law* satisfies the reason or appeals to man's consciousness of truth which does not introduce, define, and apply sovereignty.

The organization of a political society without the operation of sovereignty is as incomprehensible as a creation without a creator, as a thought without the mind from which it sprung. Sovereignty, like that energy which is called electricity and seems to be omnipresent in nature, permeates every political institution and every social organism, however crude and rudimentary, or however complex and highly developed they may be.

Before entering upon an analysis of the subject it is needful to define *sovereignty* as well as certain other terms which will be used. Definition is always difficult and often unsatisfactory. So much depends upon *how* a word is used that it is not uncommon to find a course of reasoning and even an entire system of philosophy turn upon the meaning of a single word. To anyone, who appreciates the value of accurate definition and the liability to err through an incomplete grasp of the

³ It is true that Austin relegated the discussion of it to the closing chapters of his work on the Province of Jurisprudence, but for this he is criticised by Sir Henry Maine, who supposes this illogical method to be the result of Austin's antipathy to anything which seemed to be in accord with Blackstone.

subject or through the influence of a preconceived line of argument or through imperfect operation of the reason, the attempt to define cannot be made without great caution, and the claim to correctness without hesitation. The failure of many an attractive philosophical theory may be charged to the self-sufficiency of the theorist in defining the terms which he employs. Nevertheless, words must be defined, especially when used technically; and, though there may not be universal agreement as to the accuracy of the definitions, they will form subjects of further discussion, and, even if incomplete or faulty, will disclose the basis upon which an argument rests.

Bearing in mind then the difficulties as well as the necessity of definition the writer defines sovereignty in its broadest sense as the *power to do all things without accountability*.

So extensive a power, which eliminates the elements of time and space, of motion and inertia, of mind and matter, can only find a counterpart in a super-mundane and super-human sovereignty which is coextensive with the limitless universe and which can only be possessed by an Omnipotent and Eternal Being. Sovereignty in the abstract is, therefore, coincident with *Divine Sovereignty*. It is not intended in these notes to enter that great sphere of thought which embraces the philosophy of religion and kindred subjects, but to deal with that type of sovereignty, which in contrast to the super-mundane and Divine, may be called *human sovereignty or world sovereignty*.

Such sovereignty may be defined as *the power to the extent of human capacity to do all things on the earth without accountability*. Even thus limited to the earth and to mankind, sovereignty is too comprehensive and, in a sense, too intangible to yield readily to analysis or to furnish historical illustration. It is proposed, therefore, in these notes to consider a more circumscribed type, which will be perceived in familiar phenomena, and be more fruitful of example. This lesser sovereignty is that which prevails in a state. It is the sovereignty which history knows and law recognizes, the sovereignty which affects the individual members of states, and which is the force constantly at work forming and reforming political institutions and regulating human conduct.

Before proceeding it is necessary to reach some basic idea of a state; and for a satisfactory definition the one given by Burgess may be adopted, provided it is not limited to a "modern state," but is applied to a state generally. The definition, which is concise and comprehen-

sive, is as follows: "*A state is a particular portion of mankind viewed as an organized unit*" (Burgess, vol. i, p. 51). The definitions of the American jurists, Story and Cooley, are more elaborate but convey the same idea of unity and organization. Story says that a state is a self-sufficient body of persons united together in one community for the defense of their rights and to do right and justice to foreigners. In this sense the state means the whole people united into a *body politic*, and the state, the people of the state, are equivalent expressions. (Story on the Constitution.)

Cooley defines a state as

a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. (Cooley, *Constitutional Limitations*, p. 1.)

The criticism of the last two definitions is that they assert definitely a *reason* for the union, which may seem to some open to objection or at least to question. However, if the definitions stopped here, there would be little disagreement, but they do not. Publicists have seen fit to expand their concepts of the state by declaring that they must possess particular qualifications which sometimes lead to paradoxes and contradictions. Among these required qualifications the most general are that an organized community to be a state must have a fixed territorial abode and that it must consist of a large number of persons. Undoubtedly these are characteristics of most modern states; but to admit this limitation would deprive a large number of independent communities of a name to which they appear to be entitled by the completeness of their political organization and the influence which they have exerted upon the world's history.

It must be recognized that the word "state" from its derivation carries the idea of fixity of abode; but there should be a careful distinction made in the use of the word in its application to persons and to territory. In the consideration of sovereignty, the state as an organized community of individuals is of importance. In fact, the qualification of occupation of territory is for the purpose of these notes non-essential; and its omission from the definition avoids controversy as to the correctness of the limitation which its adoption would impose.

The same objection applies to the requirement as to numbers. When it is said that a community in order to be a state must be composed of

"a large number of persons," one naturally asks, *how* large a number? If the number is not definite, who is to fix it? Some philosophers say "a considerable number;"³ others, "a multitude;" but, if Coke is correct, "*Multitudinem decem faciunt*" (First Institute). Rousseau declared one hundred thousand was enough, but Bluntschli rejects it as insufficient. Here is utter confusion, disagreement and vagueness. If a definition is of any value it must have some measure of certainty, but this feature of numbers is decidedly uncertain. It is far better to take the position of Jean Bodin and declare all discussions as to numerical limits to be irrelevant. (Dunning, p. 90.)

It seems more reasonable, therefore, and for present purposes it is sufficient, to adopt the less complex definition, upon which there is substantial agreement, and assume that, when a portion of mankind is united into a community and becomes an organized unit, it is a state.

However, to avoid misunderstanding it will be well to distinguish between the uses of the word in terms. The community of human beings will be called the *political state*; the territory, which they possess, the *territorial state*. When the word "state" is used without either adjective, the political state is intended.

It should also be noted that the words "state" and "nation" are frequently used interchangeably. The word *nation* carries with it an idea of racial and, generally, linguistic characteristics which the word *state* does not. Today most states, particularly the large and powerful ones, are correctly called nations; and, while the difference between

³ Austin says: "In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute." (Austin, p. 231.) He goes on from this to argue that though "an insulated family" of savages is an independent society, of which the father as chief receives "habitual obedience" from the rest, to call the family "a society *political* and independent" and the father "*a monarch or sovereign*" would "somewhat smack of the ridiculous."

Maine, in considering this argument of Austin's, points out the "seriousness of the admission" that the theory cannot be applied to a family. (Maine, p. 379.)

Lawrence, who appears to favor the Austinian theories, says: "A state may be defined as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey. This central authority may be vested in an individual or a body of individuals; and, though it may be patriarchal, it must be something more than parental; for a family as such is not a political community and, therefore, not a state." (Lawrence, p. 56.)

the words is recognized, they will be often used in these notes as synonyms in accordance with common usage.

Having thus defined the general terms which will be employed in the succeeding pages, a foundation is laid for the consideration of the specific subject of sovereignty in a state.

Applying the definitions given in the introductory note, of divine and human sovereignty to the sovereignty in a state, the latter would be *the power to the extent of the natural capacity of the possessor to do all things in a state without accountability*.⁴ From this definition the following deductions are drawn:

1. Sovereignty is *real* (or *actual*) only when the possessor can compel the obedience to the sovereign will of every individual composing the political state and within the territorial state.

2. Such complete power to compel obedience necessarily arises from the possession of *physical force superior* to any other such force in the state.

3. The exercise of sovereignty in a state does not involve reasonableness, justice, or morality, but is simply the application or the menace of *brute force*. Regard for rational, equitable, and ethical ideas may, and in modern states usually does, limit sovereign acts, but the acceptance of such ideas as rules of action is discretionary and not actually compulsive. All such influences being followed only voluntarily by the possessor of the sovereignty and operating by permission rather than by positive power, obedience to them does not determine the possession of the real sovereignty.

The definitions which have been given of sovereignty by accepted authorities in the fields of jurisprudence and political science do not contradict the one given above. A few quotations will suffice.

Wheaton says:

"Sovereignty is the supreme power by which a state is governed. (Wheaton, International Law, §20.)

⁴ Maine thus interprets Austin's definition of sovereignty: "There is, in every independent political community; that is, in every political community not in the habit of obedience to a superior above itself, some single person or some combination of persons, which has the power of compelling the other members of the community to do exactly as it pleases. This single person or group, this individual or this collegiate sovereign (to employ Austin's phrase), may be found in every independent political community as certainly as the center of gravity in a mass of matter." (Maine, p. 349.)

Story defines sovereignty as

The union and exercise of all human power possessed in a state; it is the combination of all power; it is the power to do everything in a state without accountability. (Story on the Constitution.)

Burgess says:

I understand by it [sovereignty] original, absolute, unlimited, universal power over the individual subject and over all associations of subjects. (Burgess, vol. i, p. 52.)

The notable thing is that in all these definitions sovereignty is termed a "power," namely, "supreme power," "all human power," and "universal power." Now the only *actual* power known in human society is physical. However religious and moral instincts may affect human action, the physical is the power that compels, including in the term the ability to effectively exert it.

Therefore, if sovereignty is the supreme coercive power in a state, it must rest upon material force without regard to the righteousness of its exercise.

While the existence of sovereignty rests upon the possession of superior physical strength, its exercise must depend upon an operation of the will of the possessor; but because there is no such mental operation is no ground for denying the existence of the sovereignty. In fact it is impossible to conceive of a human community, whether organized or unorganized, in which there is not superior physical strength resident in an individual or a collection of individuals, and where this superiority of strength resides there is the sovereignty (even if it is never exercised) and its possessor is the sovereign.

In view of the physical nature of sovereignty the following assertion of Bluntschli cannot be accepted without material modification. He says:

It is illogical to consider sovereignty as the source of the state and of law, and to put the sovereign above the state. The sovereignty is a conception of public law and not superior to it. (Bluntschli, p. 496, note.)

In the first place such a statement manifestly excludes all consideration of divine sovereignty or world sovereignty, for which reason, if for no other, it would be objectionable. But further, the characteristics of a state are union and organization, the union and organization of the individuals composing a community, each of whom possesses a certain measure of physical power. These individual powers must

have existed *en masse* prior to the union and organization of those possessing them; and, therefore, the collective power of the community must have existed from the time that the community came into being; and, if it did, this power was present before the state came into existence as an organized unit. It makes no difference by what name it is known, the superior power of the community existed in the community identical in its characteristics with the power which Bluntschli declines to term sovereignty until the state is formed and law is operative. Now, it is evident that there can be no act of union and organization without the consent of the possessor of this superior power; and, therefore, the act of organizing a state is an exercise of the will of the possessor. To distinguish this power by different names before and after a state is organized is a mere quibble in nomenclature, which can serve no good purpose.

Take another quotation from the same writer, in which he expresses an idea, which was advanced by the French philosopher, Jean Bodin, two hundred and fifty years before Bluntschli wrote:

Without force a state can neither come into being nor continue. (Bluntschli, p. 293.)

What is this "force?" Bluntschli calls it sovereignty *after* the state is organized, that is, when it is the continuing force. Why then is it not sovereignty when it is the creative force? What other appropriate name can be given to it? Since the force that brings a state into existence is identical with the force that continues it, it is rational to term it under all circumstances sovereignty. What certain publicists have tried to avoid and what they cannot avoid is that sovereignty and the sovereign existed before the state.

This is particularly true of those who maintain that sovereignty rests in the state alone as a living organism, that is, that the state and the sovereign are identical; as well as of the other class who confuse the sovereign and the government. To the former theorists the state is necessarily pre-existent to sovereignty. To the latter, the state must have been before the government and, therefore, before the sovereign. The result is that both schools are forced to assume positions which are unnatural, and to advance propositions which, though advocated with ingenious logic, are unsupported by historical facts.

As an example of the confusion caused by attempting to maintain that the state is the sovereign, place in contrast two quotations from Burgess' work. First,
 a state is a particular portion of mankind viewed as an organized unit. (Burgess, vol. i, p. 51.)

Second, referring to the granting of Magna Charta,
 the aristocracy seized the sovereign power, became the state, whereas, before this, the king had held the sovereign power, had been the state as well as the government. (*Ibid.*, p. 92.)

Here is evidently contradiction, unless the writer views Plantagenet England as some other type of state from the one defined. The state, composed of "a particular portion of mankind," is forced into the narrow compass of a *single individual*, the king, or of a small group, the aristocracy. What becomes of the thousands of persons outside of the few? Are they not members of the state? If they are, how can the state be the sovereign? The position is paradoxical, and the theory is irrational. But separate the state and the sovereign; make the former the field of operation, and the latter, the operator; then the state and the sovereign will take separate places logically consistent, and their relations will be entirely harmonious though interdependent.

This relation of the sovereign to the state and of sovereignty to the state may be more clearly brought out by studying it in the rudimentary institutions which existed in primitive communities and still exist among the savage races of today. Whether these communities were or are entitled to the name "state" is unessential; the necessary premises are the existence of a community and the presence of a superior physical force which can compel complete obedience from all persons in the community. These two facts are for the present sufficient.

In the formative period of human society, when man was little better than a beast, the strongest individual in a community overcoming his fellows in combat or causing them to fear his superior strength compelled obedience to his will. He was a master, a despot, and the small group, of which he formed a part, was forced to submit to his will. It has a likeness to the leadership among gregarious animals, and doubtless had its origin in the same sexual instinct which impels the rivals of a herd to battle for the mastery;⁵ but there is this distinction, in

Professor Boughton in his *History of Ancient Peoples* (New York, 1897) says: "Primeval men were only gregarious, there was no government—might made right."

the case of man, skill and sagacity in the use of physical strength are important factors in determining its applied value. This was the first step in the direction of political organization, a rudimentary exercise of that control in a community, which becoming established by long-continued usage, develops into definite governmental form. While the idea of chieftainship thus became fixed in primitive societies, and the advantages of submitting to a political and military leader were made apparent by experience, it is manifest that the individual, who was recognized as the chieftain, did not, except in an extremely small community, possess in himself the physical power to enforce his will against the combined opposition of other members of the community. The real sovereignty, therefore, could only in a very small and insignificant community be possessed by a single individual. Nevertheless this species of political organization under a warrior chief, who exercised sovereign authority through the voluntary submission of the members of the community, or through the submission of those members who collectively were predominant in strength and prowess, naturally developed, as communities increased in size, becoming a definite and universal political type. As might be expected, therefore, and as is actually the case, the beginnings of history find communities, tribes, and peoples ruled by absolute kings, or rather chieftains, who in subsequent ages became the heroes and demi-gods of national legend, possessing marvelous physical endowments, unsurpassed valor, and supernatural strength. Such was Agamemnon among the Greeks, Romulus among the Romans, and the hero kings of the Norse sagas. These great warrior chieftains exercised the sovereignty over the communities in which they lived, exercised it and maintained it by their personal prowess, aided by those who voluntarily acknowledged their leadership.⁶

There was no family—physical strength was man's title to woman's love. The ties of parentage were instinctively felt and it was along the line of kinship that society at last became organized into the tribe.

⁶ Professor Dunning thus states the idea of Jean Bodin (1580) in regard to primitive government: "While human society thus arose through the operation of the social instinct, the state, on the other hand, took its origin from force." * * * "The view of Aristotle and others, following Herodotus, that the first monarchs were voluntarily chosen by the people for their supereminent virtues is, Bodin says, wrong; history shows that they were military leaders who imposed their sway upon the peoples by force." (Dunning, p. 89.)

Women, physically inferior to men, were never able in the barbarous period to successfully contend for the mastery. They were always, with a few exceptions, subject to the sex to which nature had given superior strength. That inherent weakness of woman is still recognized in the states of the world, and the possession of sovereignty is deemed today a masculine prerogative just as it has been for thousands of years.

In the primitive state of society the death of the chieftain either precipitated a combat among rival leaders and factions in the community, or else the ability and physical superiority of one warrior caused all to submit to his control. In either event the one, presumptively the most powerful and skillful, succeeded to the exercise of the sovereignty. But with the establishment of the family relation, the institution of property, and the increasing influence of habit, custom, and acknowledged privilege, the right to exercise sovereign authority came by a natural process to be viewed as a proper subject of property, to which the principles of transmission could be applied. By those principles the right to exercise sovereignty became fixed as a legal right, and like other subjects of property passed by descent or was transferred by gift or purchase. Thus sovereign authority was commonly treated as hereditary, descending from father to son.

This method of succession was not the natural one found in the primitive community; but was purely artificial unless the new ruler actually possessed the brute force and martial skill with which he could cause all members of the community to submit to his will. If he failed in this, the authority which he possessed lacked the essential of real sovereignty, *the physical strength to compel obedience*. It is at this stage in political development that the theory of the "social compact" or the later theory of "habitual obedience" may be logically invoked as the basis of sovereign authority, but, whichever theory is accepted, it must be understood that the authority established is not that of the *real*, but of the *artificial sovereign*.⁷

⁷ "*Artificial*." It should be understood that the adjective "*artificial*," used to describe a sovereign and sovereignty of a particular type, does not have its primary meaning of "made by art," "constructed," but is used in its derivative and secondary sense of "assumed," "not actual." The sovereign and sovereignty, to which it is applied, are in contrast to "*real sovereign*" and *real sovereignty*; that is, although such sovereign and such sovereignty may be apparently real, generally

As in time communities became united with other communities forming large political societies, of which the members were numbered by thousands instead of by scores, the chief of each of these greater societies could never by his own personal strength enforce his will. Did he, under such circumstances, possess the sovereignty of the state over which he was the acknowledged ruler? In one sense, yes; in another, no. He held an *apparent* sovereignty, which habit, custom and usage sanctioned and clothed with all the outward indices of sovereign power; but for all its outward evidence of sovereignty it was none the less *artificial*. The *real* sovereign was the individual or body of individuals in the state possessing the physical strength which, if exerted, could compel obedience. It matters not that the stronger, under the influence of habit or custom, voluntarily submitted to the weaker, the latter in reality gained thereby no more actual strength, and the former involuntarily retained the power to coerce the ruler and all other members of the state. Thus the ruler could only exercise the prerogative of sovereignty at the pleasure of the real sovereign.⁸ This establishes the following proposition (one

recognized as real, and operating and operative as if they are real, they are none the less unreal and liable to be divested of their apparent reality by the real sovereign through the exercise of real sovereignty. It is manifest that the word "*artificial*," even in its secondary sense, does not in itself describe precisely the sovereign and the sovereignty intended; in fact, no English adjective meets all the requirements; hence it is necessary to explain the special meaning with which the word is used in these notes, and that it is adopted in preference to any other because it more nearly expresses the idea which it is desired to convey.

⁸ The theory of Johannes Althusius as to the relation of rulers to the sovereignty is thus stated by Professor Dunning: "Sovereignty (*maiestas*) is defined as the supreme and supereminent power of doing what pertains to the spiritual and bodily welfare of the members of the state. This power inheres by the very nature of the association in the people—the totality, that is of the members of the state." * * * "But, for the purpose of carrying out the function of the state, duties may be distributed among agents of the sovereign, and it is in this capacity alone that kings and magistrates exercise authority. These functionaries, whatever their power and jurisdiction in reference to the individuals, are by the very nature of the case themselves subject to the people as a whole. Sovereign power, therefore, when properly understood, cannot conceivably be vested in any individual or group of individuals less than the whole people. It cannot be alienated or delegated to any one by the people; so long as there is a people it must possess the sovereignty." (Dunning, p. 63.)

It should be remembered in reading this analysis of the German philosopher's theory that his system rested upon the idea that the state was founded on a "social contract" between the persons who composed it. He carries out this contractual

reached by Rousseau through an entirely different line of reasoning, since his is based on natural rights rather than on physical force): *The real sovereign cannot divest himself of his sovereignty nor can he be divested of it and exist.*

This distinction between an artificial sovereign and a real sovereign has not been recognized in terms by publicists, though the idea has been imperfectly advanced by some. Bluntschli, for example, says:

Besides the sovereignty of the entire nation, there is another within the state, the sovereignty of the highest member, the chief, or, since it is more clearly seen in a monarchy, the sovereignty of the prince. * * * The sovereignty of the state and the sovereignty of the prince are not in contradistinction. There does not result a division of sovereignty, as if the one half belonged to the people and the other to the prince: here are not two jealous powers striving for the supremacy. Both imply unity and plenitude of power; but it is clear that the whole, including the head, is superior to the head alone. (Bluntschli, pp. 503-504.)

Here is evidently the recognition of two sorts of sovereignty in a state, one of which is superior to the other. Yet both are assumed to be real, and there is an attempt (although the line of argument is not at all clear) to explain how they can exist harmoniously; in other words, to show that two *supreme* powers can operate without contest in the same sphere and both remain supreme. While the very idea is a contradiction, this contradiction immediately disappears if one sovereignty is seen to be real and the other only artificial.

It is needless to cite the explanations of other writers, who have found the same difficulties with the facts that were found by Bluntschli, and whose arguments are equally unsatisfactory and vague.

It was this artificial type of sovereignty that from the earliest civilized governments to the rise of the free cities of Germany in the eleventh and twelfth centuries existed in nearly every European state; a notable exception being the popular sovereignty of the early Teutons, whose system of electing their kings later developed into the political institution of an elective monarchy. This artificial sovereignty exists at

relation in the organization of governments. "The king is the executive of the people. * * * His relation to the people is that of agent (*mandatarius*) and a contract between him and the people is perfected through his choice and coronation. He undertakes to govern in conformity to the fundamental law of the land, and they agree to obey him." (*Ibid.*, p. 65.)

the present day to a more or less degree in modern states with monarchical forms of government. Nevertheless, the real sovereignty is not destroyed. *It never can be.* Since the eleventh century the real sovereign has gradually compelled recognition, until today in the more enlightened states the possessor of the real and not the possessor of the artificial sovereignty is recognized as dominant; as the actual source of political authority in a state.

The political history of England presents a familiar and at the same time a very clear illustration of this progression from the domination of the artificial sovereign to the domination of the real sovereign. During the early Norman period, when the feudal system prevailed, the king was deemed to be the sole possessor of sovereign rights, though in fact the royal power depended for its exercise upon the will of the nobility. With them was the actual strength of arm to compel obedience within the state. The lower classes, ignorant, depraved, and unorganized, were both mentally and physically inferior to their feudal lords, whose knightly valor and skill at arms held their vassals in abject subjection, compelling them to obedience by force or by the fear of their lord's displeasure.

When, therefore, King John submitted against his will to the demands of his rebellious barons at Runnymede and granted certain rights and privileges to his subjects by Magna Charta, he did not perform a sovereign act. The act of real sovereignty was that of the nobles in compelling John to append his signature and affix the royal seal to the famous instrument. As Bacon says: "*Potestas suprema seipsum * * * ligare non potest.*" (Maxims, 19.) The supreme power—that is, the real sovereignty—cannot bind itself, nor can it be bound by another, otherwise it would lose its supremacy and its reality.* To revert again to a quotation, previously given in another connection, which relates to this prominent event in English history,

the aristocracy seized the sovereign power, became the state. (Burgess, vol. i, p. 92.)

While this statement is not literally true, since the aristocracy exerted a power they already possessed, the same thought is there expressed, especially when it is remembered that the writer declares the state to be the possessor of the sovereignty.

* "Supreme power limited by positive law is a flat contradiction in terms." (Austin, p. 263.)

A half century later, Henry III. and his son were captives of the insurgent army of Simon de Montfort. During those fifty years the social condition of the common people had rapidly improved, and particularly so in the cities under the civilizing influence of trade, commerce, and the exercise of their charter liberties. That the popular masses were beginning to realize the power of coöperation and organization was manifested in their merchant and trade guilds and in their trained bands of soldiery. Their strength had been demonstrated in the civil turmoils of the period, and it was recognized by the dominant nobility when borough representatives were given seats in the first Parliament. Thus the real sovereignty of England was shared in undetermined proportion by the lords and commons.

With the increase of learning among the middle and lower classes and with a growing reliance upon their own power resulting from military experience, the commons dared at length to resent and oppose the arrogance of the nobility. The crown, taking advantage of these dissensions, gained by apparent concessions the support of the common people, and upon their physical strength rested the royal authority, the artificial sovereignty. Thus, while the real sovereignty was not actually put to the test, events show that the preponderance of physical might was with the people in contradistinction to the aristocratic class.

The same state of facts is noted by Professor Burgess, though he uses in accordance with his theory the words "state" and "sovereign" as equivalents. After reciting the coalition between the king and the commons against the aristocracy, he says:

In the organization which followed, called in political history the absolute monarchy of the Tudors, the people were, in reality, the sovereign, the state, but apparently the king was the state. England under the Tudors was a democratic political society under monarchic government. (Burgess, vol. i, p. 93.)

This assertion of power, but partially realized by its possessors, was largely due to the invention of gunpowder. Gunpowder destroyed chivalry for it made the yeoman equal in destructive ability to the knight, whose training and martial skill had so long given him the ascendancy. Gunpowder, like discipline, added a new factor in determining the physical might which is the essential of real sovereignty.

Numbers, organization, equipment, and practice in the use of firearms became the measure of strength rather than personal valor and individual muscular development.¹⁰

The people of England were long in appreciating the effect of the new destructive and their possession of superior power; but at last, goaded to action by the folly and obstinacy of Charles Stuart, they threw off the yoke of artificial sovereignty, and, by compelling obedience to their will, demonstrated the location of the real sovereignty. Since the execution of Charles I., the English people have known that they were sovereign in England. The revolution of 1688 and the peaceful revolution of 1832 are but cumulative evidence of the fact. The sovereignty of an English king, resting solely upon the will of his so-called subjects, is not real but artificial, a fiction perpetuated by custom, by reverence for the past, and, if you please, by the "habit of obedience" which Hume and Austin have made so prominent. The king, the monarch, cannot by his own might compel obedience; the *sovereign people* can.

However certain may be the nature of real sovereignty and its presence in a state, it is the artificial which has for the past three hundred years been emphasized in the majority of governmental systems through the passive acquiescence of the real sovereign; and it has been the treatment of the artificial as if it were the real that has weakened many philosophic theories and made them valueless in explaining certain important historical events. It is only in the case of great political or social upheavals in a state, when actual physical force is exercised, that the possessors of the real sovereignty arise in their true character and assert their supremacy. Such momentous events in the world's history, as the rebellion of the Netherlands against Spain, the English revolution of 1688, the American war for independence in

¹⁰ Maine, in his consideration of how far the facts of human nature and society bear out the Austinian idea regarding sovereignty, says: "The first of them is that, in every independent community, there resides the power of acting with irresistible force on the several members of that community. This may be accepted as an actual fact. If all the members of the community had equal physical strength and were unarmed, the power would be a mere result from the superiority of numbers; but as a matter of fact various causes, of which much the most important have been the superior physical strength and the superior armament of portions of the community, have conferred on numerical minorities the power of applying irresistible pressure to the individuals who make up the community as a whole." (Maine, p. 357.)

1776, and the French revolution of 1792, are manifestations of the real sovereignty.

Yet, having demonstrated its superiority and compelled obedience to its will, the real sovereign does not always establish a government consonant with its expressed authority; but, influenced by custom, inclination or expediency it permits an artificial sovereignty to continue though it may materially modify its form and limit its exercise from that which had previously existed. In the case of the revolting English colonies in America this was not so; but in England, after the dethronement of James II., the monarchy with its artificial sovereignty was restored though with restricted powers. The same was true of France after it had passed through a chaotic period, in which the sovereignty was the plaything of mobs, and through the feverish glory of the Napoleonic era. There are features which make the epoch of the French revolution unique in history, particularly the advent of Bonaparte and the influence of his extraordinary personality upon the republicanism and materialism of the French nation; but this is not the place to give to these phenomena the special consideration to which they are entitled. Suffice it to say, that with the final overthrow of Napoleon, the Bourbons were again permitted to assume their artificial sovereignty, and the real sovereignty of the French people became latent. But the spirit of the revolution was not extinguished, and, though it smouldered for a time, it broke forth again and again until the artificial sovereignty of the houses of Bourbon, Orleans, and of Bonaparte was finally consumed in the conflagration of the Paris Commune.

Successful popular revolutions and the suppression of rebellions are the manifestations of the real sovereignty in a state. Both are coercive in character, both compel obedience, and both require the exercise of superior physical strength, including in that term the use of weapons of war, military skill, discipline and equipment.

The actual expression of the real sovereignty occurs, as has been shown, in times of civil turmoil, but it cannot find expression, when domestic peace prevails, through the medium of physical force. The fact that the force is present and that it is supreme within the state is sufficient to cause recognition. Under peaceful conditions the acts performed *directly* by the real sovereign are limited to the following: (1) The establishment of a government; (2) the delegation of powers

to that government; (3) the granting of civil liberty to members of the state; (4) the changing of any provisions relating to the first three subjects; (5) the appointment of governmental agents; and (6) the enactment of certain laws. The three first acts are accomplished by adopting or consenting to a constitution for the state; the fourth, by amending such constitution; the fifth, by election; and the sixth, by the processes known as *initiation* and *referendum*.

It makes no difference *how* a constitution or a constitutional amendment is introduced, its binding force is derived from its positive or passive adoption by the real sovereign. But this binding force only applies to the individuals in the state considered as distinct units. It cannot bind the individuals considered collectively as a single body or that undetermined portion which possesses the superior physical force in the state. That dominant portion is the sovereign, and the sovereign cannot bind itself or be bound. In a Christian state, just and moral principles usually control the majority of individuals in the exercise of the share of the sovereignty, which each possesses as a member of the sovereign body, but only because of the prevalence of religious sentiment and of the consciousness of moral obligation. The body of individuals in a state, in which body resides the real sovereignty, is not restrained in any way, except by the limitations inherent in human nature, in declaring the fundamental law of the state. They may, indeed, if they so will, embody in a constitution provisions which are manifestly unjust and immoral. It is not at all a question of right, but a question of power. Yet there must be no confusion of the right and the power. Might may make law, but might does not make right. The sovereign is supreme, but the sovereign may be unrighteous.

As it is impossible, except when actual physical strife occurs in a state, to determine with certainty who are and who are not the possessors of the real sovereignty, there are certain qualifications which have been assumed in modern states to be evidence of an individual's right to share in the exercise of the sovereignty.

These qualifications are usually based, whether intentionally or not, upon the *presumptive physical strength* of the individual. They are as follows: *First*, Sovereign rights are confined to *males*, because, as has been pointed out, females are physically inferior and therefore powerless to maintain such rights by force. *Second*, The males are also limited to those who are presumed to have attained full bodily

vigor, which is assumed to be when they have reached a certain age. These two requirements rest upon the natural attribute of sovereignty, strength. But property and educational qualifications are purely artificial limitations based upon the desire to restrict the exercise of sovereignty to those who will be influenced by reason, conscience, and patriotism in giving expression to the sovereign authority.

An assumption takes the place of physical demonstration in times of domestic peace, the test for possession of the sovereignty is not physical but must rest upon a fulfilment of the qualifications imposed. Whatever may be the difference between two persons in physical vigor if each meets the requirements laid down for sharing in the sovereignty, they are deemed to be equal in their possessive right in such sovereignty. It is clearly an assumed equality based upon assumed evidences of strength, and in some cases of intellectual ability, but such assumptions are inseparable from the internal peace of a state. Any other method would introduce confusion and conflict, and would, therefore, be irrational since it would bring about a condition hostile to progress and the common weal. Furthermore, this assumed equality is not so artificial as it at first appears, since gunpowder and modern inventions have equalized the martial worth of individuals making the skillful, though weak, superior, man for man, to the unskilled though strong.

The discussion concerning expressions of sovereignty in times of peace and the artificial equality of qualified individuals assumed to be possessors of the sovereignty applies to modern democratic states, whether their governments are monarchic or republican. In such states the peaceful determination of the sovereign will necessarily depend upon the expressed will of the greater number of the assumed possessors of the sovereignty, since unanimity is substantially impossible when the possessors are numbered by thousands or even by hundreds, unless some artificial plan is followed, such as was employed in the Iroquois confederacy. The result is that *the rule of majorities* is supreme. It is well to fix in the mind these two characteristics which mark the exercise of sovereignty in times of domestic peace, namely, *the equality of individuals in possession, and the rule of majorities.*

The nature of sovereignty in a single state, whether it be real or artificial, yields readily to analysis, but the more complex type found in a composite state, particularly in a federal state like the United

States, requires careful discrimination between the actual and apparent facts in order to determine the true nature of such sovereignty. The real and the apparent results of historical events must be distinguished and the mind of an American student must be freed from the bias and prejudice which for a half century have influenced writers upon political science in dealing with the institutions of the United States.

It is an accepted principle of the law of nations that every state, whatever may be its population, power and resources, is the political equal of every other state, and that its sovereign is independent and supreme within the state. There is no such thing as *degrees* of sovereignty among states; the nature of real sovereignty precludes such a thought. Now let this manifest truth be applied to the problem of sovereignty presented in the federal state of the United States.

This condition of independence and equality obtaining among states was recognized in America during the war for independence by each of the thirteen colonies having an equal voting power in the revolutionary government and also in the government established by the articles of confederation; and this equality prevailed irrespective of the great contrast in the territorial extent, wealth, and population of certain of the allied colonies. From this fact alone it may be assumed that during the period from the commencement of the Revolution to the adoption of the Constitution of 1787, each one of the thirteen original states was a distinct, independent political society with a separate sovereign, otherwise this assumed equality would have no theoretical or practical basis.

A federal state or union, originating from the joining together of several independent states, is from its composite nature a political organism, in which the individual units are such states instead of persons. If this statement is correct and the likeness is at all complete, the same general rules which apply to a state composed of persons ought to apply to a federal state composed of states, and the same incidents should be manifested.

It has been shown that the sovereignty in a single state in times of domestic peace is shared *equally* by a body of qualified individuals, and that the chief sovereign acts are the adoption of a constitution and of constitutional amendments. Applying this test to the American Union, which presents an example of a complex type of federal state, the federal constitution and all amendments to it should, if the simi-

larity to a single state exists, be adopted by the states of the union voting as units, each state having an *equal* voice in such sovereign acts. This is indeed the fact.

There is, however, this difference between a single state and the particular federal state under discussion. In the adoption of the Constitution of the United States no state was considered to be subject to its provisions and to the government which it established until such state had voluntarily and formally submitted to the instrument. In the case of a single state, on the other hand (unless Pufendorf's theory of a "governmental contract" is accepted), every individual, whether willing or unwilling, is *compelled* to coöperate in maintaining the government established and to obey the will of the sovereign as declared by the sovereign or through the medium of an authorized agent. At least theoretically this difference exists and has been generally accepted as existing. Here are the facts. It was provided by the Constitution of 1787 that it should become operative upon being adopted by the people of nine of the thirteen states which had united under the articles of confederation. Nine was a majority so large that they doubtless possessed the physical force to compel obedience from any or all of the other four states if they declined to accept the constitution. The question is, would those that assented to its provisions have compelled those declining to submit? Suppose Rhode Island had finally and emphatically refused to become a member of the union, would the other states have permitted it, considering its geographical situation, to remain independent and free from federal jurisdiction and law? It is, and must remain, an open question, since all the thirteen states voluntarily came into the union. There seems to be, nevertheless, but one rational answer to this hypothetical question, and that is that the strong for their own self-defense would have coerced the weak. The difference, therefore, which is stated above may be imaginary rather than real; an erroneous theory rather than a right one. The opportunity to test its correctness never arose.

Having once entered into the community of states and submitted to the rules of the majorities fixed by the Federal Constitution, a state was in much the same status as that of a naturalized citizen who, having sworn allegiance to the government of a state, must bear the burdens as well as enjoy the privileges of citizenship. A state, on becoming a member of the federal union, is bound to abide by the will of the

constitutional majority no matter how tyrannical and unreasonable such majority may be, or to what extent changes in the fundamental law may affect its original condition or modify its local institutions. There is, however, one important exception to this rule. If a state doubts whether the constitutional majority or the government established by it actually represents the possessors of the real sovereignty, it may appeal to force to determine where the superior physical might of the union rests. It is a question of fact rather than of right, although the states composing a federal state possess the so-called natural right to rebel against tyranny and oppression, as do the individual members of a single state, a right in fact to test the reality of the sovereignty which is being exercised.

Sovereignty in times of domestic peace rests in those who as units adopt and amend the constitution, whether in a single or a federal state. In the United States these units are clearly the *political groups* of individuals, each of which forms a separate state of the union, and not the individuals themselves. Amendments to the organic law come into operation upon being approved by three-fourths of the *states* and not by any fixed majority of all the qualified *citizens* in the union as a whole.

An essential characteristic of the possession of sovereignty, when domestic peace prevails within a state, is equality among the members of the possessive body of qualified individuals. This equality exists as between the states composing the United States, but it does *not* exist as between United States citizens resident in different states. For example, Nevada and New York, as states, have an equal voice in passing upon an amendment to the constitution of the federal state, but on account of their great difference in population a citizen of Nevada has *nearly two hundred times* more voice in such legislation than a citizen of New York. A still more forceful illustration is that of a United States citizen residing in one of the federal territories, who in spite of his full citizenship has no voice at all in constitutional enactment. These facts are cited simply as cumulative evidence of the assertion, that the states as units and not the citizens of the United States are the assumed possessors of federal sovereignty in times of internal peace.

From the foregoing it will be seen that, in times of peace, the individual states in a federal state like the United States stand in the same

relation to the federal sovereignty that the male citizens of legal age stand to the sovereignty in a single state. To carry the analogy further in the case of the United States—the territories of the United States are similar to citizens of the male sex in a single state, who are minors, but who will in time attain to equality in sovereign rights; and colonies are like the females in a state, who owe it allegiance but lack the inherent qualities to become possessors of the sovereignty. Thus the American federal system is the rational and logical development of the republican principle as it appears in a single state.

The order of the consideration of sovereignty in a federal state has been reversed from that followed in the case of a single state for the reason that a federal state is the product of peaceful conditions and internal peace is necessary to its continuance. It might be argued from analogy to a single state that in times of domestic war the equality of states composing a federal state, which is assumed in times of peace, disappears, giving place to the true measure of sovereignty, *physical force*, determined by the resources and military strength of the individual states. To maintain such a proposition the assumption must be made that the states in a union continue as separate and distinct units in determining the location of the real sovereignty. However harmonious with the federal principle such an assumption may be, and however logical it may appear to thus continue the analogy between a single and a federal state in their relations to sovereignty, experienced facts deny the truth of the assumption and the correctness of the analogy.

Political units, such as the states of a union, are the product of reason and agreement, and not of force. They are, therefore, in fact artificial in so far as they are considered units. The exercise of force in a federal state; that is, the expression of the real sovereignty, of which the American Civil War is a noteworthy example, proves that such sovereignty rests upon a deeper foundation than the states as political units. In the case of a domestic conflict involving the entire union a state is divided through the adhesion of a portion of its citizens to one side of the contest and of another portion to the other side, without regard to the opinion of the majority. Though the majority of the individuals in certain states may give their support to one of the belligerent parties, and the states may be said to be in favor of that party, the minority may, by uniting with the opposite party in other

states make the physical strength of such opposition superior. It is apparent that the individual, rather than the state, is the important factor in determining the location and possession of the real sovereignty. The true possessor of such sovereignty is, therefore, that mass of individuals in a federal state, which, regardless of the relations which the individuals may bear to the separate states, has the power through the exercise of their combined physical strength to compel obedience throughout the union. Furthermore, this mass of individuals, being able without limitation to enforce absolute submission to their collective will, possesses a complete sovereignty, which may be exercised without regard to the political existence of territorial boundaries of the separate states. Thus a union of states, under the stress of civil war, loses its federal character, and becomes in fact a single state, a nation, although it may, at the will of the sovereign, maintain federal institutions throughout the war.

From the foregoing the following conclusions are established: (1) A federal state cannot exist in its federal character during the progress of a civil war involving the entire federal state. (2) There is no such thing as *real* federal sovereignty. (3) The real sovereignty, which becomes manifest by the exercise of superior force throughout a union of states, is national. (4) A federal state having been subjected to the exercise of the real sovereign and thereby nationalized, its national character is not destroyed though it returns, with the consent of the real sovereign, to the forms and practices of a federal system.

Since, therefore, domestic peace is essential to the existence of a federal state, a federal sovereign, and federal sovereignty, the further consideration of such sovereignty in these notes must be predicated upon internal peace and with a full recognition of the artificial character of such sovereignty.

ROBERT LANSING.

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EDITORIAL COMMENT

The American Society of International Law was founded in 1905, but it was not until 1906 that a definite organization was effected.

While the necessity of such a society was felt by many, no serious steps were taken until the summer of 1905. It occurred to some of the members of the Mohonk Lake conference on international arbitration, that a society devoted exclusively to the interests of international law as distinct from international arbitration might be formed and that the members of the Mohonk conference would supply a nucleus membership. Accordingly a call was issued to the members present at the conference and as the result of the call and meeting of those interested a committee was appointed with Oscar S. Straus as chairman and James B. Scott as secretary, to consider plans for a definite organization and for the publication of a journal exclusively devoted to international law as the organ of the Society. On December 9, 1905, a meeting of the committee was held at the residence of Oscar S. Straus in New York City, and as the result of favorable reports of the members present it appeared feasible to proceed immediately to the definitive organization of the Society. Accordingly a call was issued by the chairman for a meeting of those interested in international law and its populariza-

tion, to be held at the New York Bar Association, on Friday, January 12, 1906.

At this meeting it was decided to organize upon a permanent basis a society of those interested in the spread of international law with its ideals of justice and therefore of peace; a constitution was adopted; officers were elected and the Society took its place, it is hoped, permanently among the learned and influential societies of the world.

The aim and scope of the Society as well as its internal organization will sufficiently appear from the prospectus and constitution which are here printed in full:

PROSPECTUS

THE AIM AND SCOPE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

From the very beginning of our national existence the people of the United States have been keenly interested in the common law of nations. In an ordinance of 1781, passed before the recognition of Independence, Congress professed obedience to the laws of nations "according to the general usages of Europe," and in the act of admission to the family of nations the new republic recognized International Law as completely as International Law recognized the new republic. Nor was this formal acceptance of International Law the passing fancy of the moment. The Constitution of the United States proclaimed it as an existing system and solemnly conferred upon Congress the power to punish "offenses against the law of nations." It is therefore the law of the land by Constitutional enactment, as well as by the necessities of the case, and the general government as well as courts of justice have invariably and unhesitatingly declared that "International Law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana*, 1899, 175 U. S., 677, 700.)

If it be borne in mind that the course of recent events has not only given to our country a more prominent and influential position in the family of nations than it had previously enjoyed, but has brought government and people into closer and more intimate relations with the Spanish-American states in the western world and the peoples of the eastern, it is at once evident that Government and people are fundamentally and constitutionally interested in International Law, and that a correct understanding of the system as a whole is an essential element of good citizenship.

Thus to state the problem is to prove it and to make manifest to the American people the fundamental importance of a correct understanding of those principles of International Law which our country is called upon to observe in its foreign relations, and to administer as municipal law in our domestic tribunals. The establishment of new and more effective agencies to promote the study of these principles and to extend their influence at home and abroad is a duty incumbent upon enlightened citizenship.

Profoundly impressed by these considerations, the American Society of International Law was organized at New York on the twelfth day of January of the present year, and it is believed that the influence of an association of publicists and others organized to represent these interests of our people would count for much in the formation of a sound and rational body of doctrine concerning the true principles of

international relations. It is equally certain that the publication of a journal devoted to the exposition of those principles would offer a ready and valuable means of communication between jurists and students of International Law on the one hand, and the scientific and lay public on the other. The absence of any organization in the United States having for its first and sole object the promotion of these purposes, and the lack in the English-speaking world of any periodical devoted exclusively to International Law indicate the need of such a society.

American publicists, such as Kent, Marshall, Story, Wheaton, Halleck, Lieber, Lawrence, Dana, Field, Woolsey and Wharton—not to mention those among the living—have made many and varied contributions to the science of International Law. It is too plain for argument that the existence of such an organization with annual and special meetings and the publication of a periodical exclusively devoted to International Law will not only furnish a nucleus and incentive but also a means of communication. It would likewise seem equally clear that the Society and Journal would necessarily and directly foster the study of International Law and promote the establishment of international relations upon the basis of law and justice.

Your coöperation in the work of the Society is earnestly requested.

CONSTITUTION

ARTICLE I

Name

This Society shall be known as the AMERICAN SOCIETY OF INTERNATIONAL LAW.

ARTICLE II

Object

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society including a copy of the publications issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting

of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership but shall be exempt from the payment of dues.

ARTICLE IV

Officers

The officers of the Society shall consist of a president, nine or more vice-presidents, the number to be fixed from time to time by the Executive Council, a recording secretary, a corresponding secretary and a treasurer, who shall be elected annually, and of an executive council composed of the president, the vice-presidents, *ex officio*, and twenty-four elected members whose term of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The recording secretary, the corresponding secretary and the treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all the offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers of the first year shall be nominated by a committee of three appointed by the chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

ARTICLE V

Duties of Officers

1. The president shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the council may assign to him. In the absence of the president at any meeting of the Society his duties shall devolve upon one of the vice-presidents to be designated by the Executive Council.

2. The secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the council may assign to them.

3. The treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programmes therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a chairman who shall preside at its meetings in the absence of the president, and who shall also be chairman of the Executive Committee.

ARTICLE VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

ARTICLE VII

Resolutions

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the council, and no vote shall be taken until a report shall have been made thereon.

ARTICLE VIII

Amendments

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

Adopted January 12, 1908.

ELIHU ROOT, *President.*

JAMES B. SCOTT, *Recording Secretary.*

CHARLES HENRY BUTLER, *Corresponding Secretary.*

OSCAR S. STRAUS, *Chairman Executive Committee.*

CHANDLER P. ANDERSON, *Treasurer.*

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. This is the one aim and purpose. The fundamental

object of the Society and the hope of the members was and is that it may contribute in some degree to the establishment of international relations on the basis of law and justice. To effectuate this purpose the Society will hold annual meetings at which questions of international interest will be discussed and the proceedings will be published in a volume for distribution to members. The first annual meeting will be held in 1907, in Washington, D. C., on the nineteenth and twentieth of April—days not without a certain international as well as historical interest to students of history.

A programme is in the course of preparation and will be sent to all members of the Society.

It will be noted that the American Society of International Law differs from the Institute of International Law in that its membership is not restricted solely to specialists in international law. In one way this may seem to be a disadvantage, but when it is remembered that the "specialists" of international law will necessarily be included within the membership, these societies do not differ so much as would appear at first sight. The value of men of affairs, and the broad experience they bring to the discussion of a question of theory, cannot be or should not be overlooked or rejected.

In the matter of membership the resemblance of the Society to the International Law Association is marked, but the likeness is confined solely to the question of membership. The Association publishes its proceedings and while they circulate among the members and find an honored place in the library, the Association has not taken an active part in the formulation and propagation of the theory and practice of international law. The proceedings of the Association lack the scientific value and precision of the proceedings of the Institute and they have not influenced international thought as keenly or profoundly as the *Annuaire* of the body of specialists composing the Institute.

The American Society of International Law has sought to combine the excellencies of both organizations and to obviate at one and the same time the drawbacks necessarily existent in such societies. The Institute holds annual meetings of specialists and publishes the proceedings in the *Annuaire*. This volume appeals solely to the scientific world. The Association composed of specialists and interested persons prepares a programme, suitable and agreeable to the larger and less scientific body of members.

The American Society of International Law recognizes the value of a broad and democratic membership and prepares a programme suited to the occasion. It has, however, established as an organ of progressive and

scientific thought the AMERICAN JOURNAL OF INTERNATIONAL LAW which will, it is hoped, bring home to the English reader, layman or specialist, the theory and practice of international law. The journal is the handmaid of science and its pages will be closed to the language of prejudice and bias.

SOCIETIES OF INTERNATIONAL LAW

The Institut de droit international was organized in September, 1873, at Ghent. M. Rolin-Jaequemyns, a Belgian advocate and scholar, took the lead in effecting the organization, although Dr. Francis Lieber was one of the first to suggest the plan. The membership of the Institut is limited to 120; the members and associates are chosen because of some contribution of value within the field of international law. It is an organization of specialists, and its work has been of a scientific character. It works through permanent committees, which prepare reports for discussion at the annual meetings; through its efforts many unsettled questions have been carefully discussed, and the results of the discussion stated in the form of rules; such rules have in some cases formed the basis of later definite action by international conferences. One of the best known and most important works of the Institut is *Les lois de guerre sur terre*, agreed upon at the Oxford meeting of 1880. As a body of eminent text-writers and scholars the Institut gives a united expression to the views of the most noted living authorities upon international law. The proceedings of the Institut are published in its *Annuaire*, of which twenty volumes have appeared to 1904.

The International Law Association was organized in 1873 as the Association for the Reform and Codification of the Law of Nations. It admits to membership all who take an interest in the objects of the Association. From the first its membership has been largely English, although most of its meetings have been held in cities on the continent of Europe. An annual meeting is held, and its proceedings have been published regularly since the first meeting. No other publications are issued. The International Law Association is broader in its foundation than the Institut; its membership is open to others than specialists, and its work, though valuable, is less scientific and less important than that of the Institut.

The following is a list of the principal periodicals devoted wholly or in part to questions of international law:

Revue de droit international et de législation comparée. Established in 1869. 37 volumes issued to end of 1905. Published at Brussels six times a year.

Revue générale de droit international public. Established in 1894 at Paris. Has published twelve volumes to end of 1905. Issued bi-monthly.

Zeitschrift für internationales Privat und öffentliches Recht. Leipzig, 1890-1905. 15 vols. Six numbers annually.

Revista de derecho internacional y politica exterior. Established in 1905 at Madrid by the Marquis of Olivart.

Rivista di diritto internazionale. Begun in January, 1906, and issued bi-monthly.

Zeitschrift für Völkerrecht und Bundesstaatrecht. Begun in January, 1906. Six numbers to be issued annually.

Journal de droit international privé et de la jurisprudence comparée. Paris, 1874-1905. 32 vols. Bi-monthly.

The American Political Science Review, of which the first number appeared in November, 1906, devotes a section to international law.

To this list it is a pleasure to add two journals from a part of the world in which international law was considered to be an exotic until yesterday. Reference is made to the island empire of Japan which is anchored, so to speak, off the coast of Asia just as the United Kingdom of Great Britain and Ireland is moored off the continent of Europe, and teaches the impressive lesson that energy, character and tradition are not without influence in the world's history.

Ingrance of the Japanese language would compel the JOURNAL to pass the *Revue de Droit International* and the *Revue Diplomatique* with a brief mention were it not for the courtesy of the learned councilor of the imperial Japanese embassy, M. T. Miyaoka, who contributes the following graceful and apt paragraphs:

As regards the language of those publications, you will observe that they appear solely in the Japanese language. The impression that one or the other of them was published in English or French, probably arose from the fact that the particular copy which was examined happened to contain an international document drafted in French or in English, or some extracts from the works of some eminent American or European jurists were reproduced therein. You may be interested to note that the accompanying copy of the *Revue Diplomatique* gives as the frontispiece a portrait of Mr. Andrew D. White, whom I had the pleasure of knowing intimately in Berlin when he was the United States Ambassador to Germany. This particular issue besides giving a biographical sketch of the life of that eminent scholar and diplomatist, contains, among other things, some of the protocols of the peace conference at Portsmouth.

Speaking of the frontispiece, I might be permitted to remind you that our books begin where yours end, probably due to the antipodal position which the Orientals and the Occidentals occupy. I trust, however, that the fact that the back of our books corresponds to the front cover of yours, does not in any way alter the truth that there is a common brotherhood in learning and that there is no barrier of states in the intellectual intercourse of man.

In the case of the *Revue de Droit International* while the real front cover is written entirely in Japanese and there is nothing to indicate therein but that the whole of the

publication is in Japanese, the back of the journal is done up like the front cover of a brochure written in French.

The exact dates on which these magazines began to be published cannot be ascertained without writing to Japan but both of them are monthly publications and the dates on which they were entered at the Japanese post office as third class mail matter are given thereon. By computation based on the respective numbers which the accompanying issues bear, we arrive at the conclusion that such dates of the entry at the post office were probably the dates of their first issue. On this assumption I think it is safe to say that the *Revue Diplomatique* has been published since January 10, 1898, while the *Revue de Droit International* began to appear from April 30, 1903.

CARLOS CALVO

The death of Carlos Calvo, on May 2, 1906, at Paris, removes from the select and authoritative writers on international law an honored and long familiar figure. Pradier-Fodéré died in 1904 and was like Calvo, although in a lesser degree, connected with South America. The passing of these two writers of the most voluminous and comprehensive treatises on the law of nations leaves a void not likely to be filled for many a day.

Carlos Calvo was born in Argentina in 1824 and was, therefore, at the time of his death eighty-two years of age. His career was long and honorable and for many years he represented his country in Europe, most recently as minister at Paris. By profession a diplomat, it is as a writer on international law that he will be longest remembered. Among his chief works are the following: *Derecho Internacional teórico y práctico de Europa y América* (2 vols., 1868) familiar to the student in the learned author's French version: *Le Droit International théorique et pratique précédé d'un exposé historique des progrès de la Science du droit des gens* (5th ed., 6 vols., 1896); *Manuel de Droit International*; *Recueil Complet des Traités, Conventions, etc., de tous les États de l'Amérique Latine depuis l'Année 1493 jusqu'à Nos Jours* (1862-1869); *Dictionnaire du Droit international public et privé* (2 vols., 1885); *Dictionnaire manuel de la Diplomatie et du droit international public et privé* (1885).

It is not without interest to note that Calvo began his career as a publicist, in 1862, by a Spanish translation of Wheaton.

The mere enumeration of these works shows the industry and range of the distinguished author, and while it cannot be said that any or all of his works are likely to become classics of the science, they are all sound, solid and learned contributions. Industry was his great gift, and what industry could accomplish, he did. He carefully examined a doctrine in the light of its history and origin; he cited the literature on the subject

and stopped. It was not his to build a permanent structure of his own from the materials amassed by his industry and perseverance. He was a master mechanic; he was neither a thinker nor an artist. He was, however, a learned writer and his works will keep his name green for many a day.

The Calvo doctrine, elsewhere described, is likely to prove his most individual contribution to the profession of his choice.

THE ALGECIRAS CONFERENCE

Mr. Lecky declared nationality to be the miracle of the nineteenth century; were he alive he might suggest that the twentieth century opens an era of expansion. But mankind has always lived in an age of expansion. Asia expanded into Europe, that is overran Europe; Europe expanded into America, and it is popularly believed that but for the Monroe doctrine and the danger of its enforcement goodly tracts of America would be under foreign dominion instead of enjoying the blessings of self-government. Be that as it may, Europe is not seeking to colonize the western world—but is expanding at present into Africa.

Great Britain is comfortably seated in Egypt in the somewhat amusing attitude of schoolmaster, and it is safe to say that the Egyptian will have taken many a post-graduate course before England evacuates the valley of the Nile and the highway to India. The European powers have parceled out the choice bits of darker Africa and are introducing civilization at the expense of the native.

France has expanded in the Far East and in various parts of Africa, but devotes herself assiduously to her immediate neighbors as it were. Algiers has long since renounced the way of the Corsair and has settled down into an orderly department of the French republic. Tunis enjoys the luxury of a French protectorate since 1881. A glance at the map will show how advantageous the possession of Morocco would be to France for it would consolidate her African domain giving geographical unity to her colonial empire as well as enabling the republic to share with Spain and Great Britain the entrance to the Mediterranean. Leaving out the question of territorial expansion, which would be in itself determinative, the annexation of Morocco would be of importance to France, for Morocco is a bad neighbor and the lawless land offers at once a basis of operation and an asylum for the disaffected in Algeria. Sedan shifted the balance of power in Europe and France is not free to pursue the conquest or indeed the slower process of absorption of Morocco as she once was before the madness of Louis Napoleon wrecked an empire

that his uncle undermined. Germany claimed an interest in the settlement of Morocco, and refused to allow France a free hand. The relations of the two countries became strained and to prevent possible disagreeable consequences it was finally agreed that the great powers should go into conference on Moroccan affairs. France yielded to Germany and consented to take from the powers what she would have taken alone.

On joint invitation of France and Germany the conference met at Algeciras in Spain on January 16, 1906, to consider a programme arranged in advance and agreed upon by the powers chiefly concerned.

Inasmuch as the United States was a party to the protection convention of 1880 at Madrid (Treaties in Force, 1904, pp. 561-567; and see 2 Moore's International Law Digest, 748-751), an invitation was extended to this conference, and the United States was represented at Algeciras by Mr. Henry White, ambassador to Italy (recently designated as ambassador to France), and Mr. Samuel R. Gummere, American minister to Morocco.

American interests in Morocco are not extensive, platonic rather than business like, but the United States was interested in the conference, namely, that an agreement should be reached by the powers; that in such agreement the open door policy should prevail and that religious and racial intolerance should find no place. It is perhaps not wide of the truth to say that the American representative played the modest but not unimportant rôle of the fly-wheel.

After a session of three months an agreement was reached April 7, 1906.

The two questions of supreme importance before the convention were police organization and financial reform. France and Germany compromised their differences on the question of police regulation, by the terms of which France and Spain are entrusted for a period of five years with the maintenance of order in Moroccan ports.

For the regulation of financial reform, it was agreed that the bank of Morocco be established at Tangier under international control and supervision; that France have three shares and that each of the signatory powers have a single share; and that the bank itself be supervised by four censors, appointed respectively by the banks of France, Germany, Great Britain and Spain.

Before the agreement to a conference a feeling prevailed quite generally that France was being crowded by Germany and it was known that the policy of France had the approval of Great Britain. (Declaration Respecting Egypt and Morocco, between Great Britain and France, signed April 8, 1904.) It was a foregone conclusion that the Franco-

Russian entente would manifest itself in a matter in which Russia had no special interest. The attitude of Italy was not so easy to predict, because Italy was thwarted in its policy of African expansion by the establishment of a French protectorate in Tunis in 1881. But in the conference the Latin made common cause with the Gaul against the Teuton. The Teutons Austria and Germany stood together.

It would seem that the isolation of Sedan is past and that the powers of Europe are forming new alignments. The accession of King Edward has resulted in an Anglo-French entente of April 8, 1904, which has signalized itself by the settlement of outstanding difficulties in Newfoundland and by a recognition of the permanency of the British occupation of Egypt. An Italian rapprochement is likewise evident, and it would seem that the third republic is obtaining a standing in the world.

The influence and disinterestness of the United States in the Algieras conference are nowhere better stated than in the speech of Prince von Bülow in the Reichstag, on November 14, 1906:

In regard to our relations with America, the majority of this House will support me in the statement that Germany and America belong to those nations which, both upon natural and historical grounds, should have mutually good relations with each other. Our frontier lines do not touch each other; our general interests tend in the same direction; our commercial interests make it necessary that we should each use conciliatory means and that we should arrive at a mutually good understanding; and if these two conditions be met, it seems to me that upon these grounds an agreement is not in any sense impossible.

I wish to avail myself of this opportunity to declare that we have reason to be grateful to America for its attitude at the conference of Algieras. America took, by reason of its less important interest, an attitude of reserve. It maintained its neutral position throughout, but its distinguished and highly respected representative, Mr. White, omitted no opportunity to remove difficulties and to aid toward an agreement which should be satisfying to all the parties in interest. That was a great service which America rendered to the peace of the world, because the failure of the conference of Algieras would not only have broken the relations between Germany and France, but would have disturbed the general political situation in the world, and would have introduced a disturbing and threatening element into the politics of all nations.

This was the second great service which America rendered to the peace of the world, the first being the reestablishment of peace between Japan and Russia.

LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION, 1906

The report of the twelfth annual meeting of the Lake Mohonk conference on international arbitration, held at Lake Mohonk, New York, May 30 to June 1, 1906, has been recently published and from it the unanimous platform and resolutions of the conference are taken.

PLATFORM—At the present time it is important that public attention should be concentrated upon the second Hague conference soon to assemble. We hope and believe that the beneficial results of the former conference will be equaled and perhaps surpassed by further deliberation in the land of Grotius, upon the principles of international law and the best methods for the pacific settlement of international difficulties.

Especially we hope that the second Hague conference will elaborate and propose a plan by which like conferences may be held at stated periods, and that in the intervals appropriate officers may be maintained at the Hague so that these conferences may become a permanent and recognized advisory congress of the nations.

A general arbitration treaty to be formulated by the Hague conference, is most desirable and will doubtless be accepted by all or nearly all the countries represented in the conference.

Among other subjects of immediate importance the many unsettled questions arising out of maritime warfare, including the exemption of private property from seizure at sea and the neutralization of ocean routes, are respectfully commended to the consideration of the Hague conference.

As the general restriction of armaments can only be secured by concurrent international action, unanimously recommended by the British House of Commons, we earnestly hope that this subject will receive careful and favorable consideration.

While we shall welcome any action taken by the coming Hague conference in the way of clearly defining the rights and obligations of belligerents as to each other and as to neutrals; of lessening the horrors of war, and of giving increased stability and protection to the Red Cross movement; it is our hope that the conference will remember that it is consecrated to the great work of ending as well as softening war, and of subjecting the relations of nations to the dominion of law rather than force.

Resolved, That the twelfth annual Lake Mohonk conference on international arbitration respectfully petitions President Roosevelt to instruct the delegates from the United States to the next Hague conference to urge that body to give favorable consideration to three measures which will greatly conduce to the peace and welfare of the world:

A plan by which the Hague conference may become a permanent and recognized congress of the nations with advisory powers;

A general arbitration treaty for the acceptance of all the nations;

A plan for the restriction of armaments and if possible for their reduction by concurrent international action.

THE PEACE OF THE MARBLEHEAD

In 1905 President Roosevelt earned the world's gratitude by persuading Russia and Japan to end the bloodshed in Manchuria by a fair and full discussion of the questions at issue. The result of these protracted conferences was the Peace of Portsmouth.

In a lesser degree but in no different spirit the United States appeared as a pacifier in the affairs of Central America. This time the president did not act alone but was seconded in every respect by President Diaz of Mexico.

If it is perhaps too much to say with Dr. Franklin that a bad peace is better than a successful war, it is certain that a fair and just peace is better than all wars put together.

The facts of the case are few and simple. In May of 1906, a revolt broke out in Guatemala against the government of President Cabrera. Now this would seem to be a matter solely for the enlightened or misguided patriots of Guatemala. A glance at the map, however, shows how easily a rebellion can be aided from the border of a neighboring state. San Salvador was accused of helping the rebels, and as it is so much easier to strike a blow than to ascertain truth and act wisely and justly, war resulted between the two neighbors. But Guatemala has another neighbor on the south—Honduras—and nothing was more natural or easier than to embroil Honduras in the struggle. This was done by a party of Guatemalans who invaded Honduras. The result was that Guatemala found itself at fisticuffs with San Salvador and Honduras, with a fair chance of involving directly or indirectly the remaining states of Central America.

To prevent this President Roosevelt and President Diaz coöperated in extending their good offices which were accepted by the belligerents on July 16. Two days later an armistice was declared, and under the personal guidance of the American and Mexican ministers, representatives of the jarring factions were got on board the *Marblehead*, an American cruiser, which promptly steamed beyond the three-mile line so as to be on the high seas. Whether the calm of the ocean, or the sweet reasonableness of peace dawned upon the representatives, or whether finally they were overcome by *mal de mer*, incident to life upon the high seas, is perhaps a matter of no great moment. The fact is that on the 20th an agreement was reached and signed by Guatemala, San Salvador and Honduras, providing for the establishment of peace, the withdrawal of military forces within three days, an exchange of prisoners, the negotiation within two months of a treaty of friendship, commerce, navigation, and the reference of future differences to arbitration by the presidents of the United States and Mexico.

This agreement had the moral sanction of Costa Rica and Nicaragua.

In accordance with the provisions of the *Marblehead* treaty, a conference of Central American representatives met, September 15 to 25, in San José under the presidency of Luis Anderson, minister of foreign affairs for Costa Rica.

This resulted in (1) a general treaty of peace and friendship, arbitration, commerce, extradition, etc., signed September 25; (2) a convention for the establishment of an international Central American bureau at

Guatemala, signed September 25; and (3) a convention for the establishment of a pedagogical institute of Central America, under the general control of Costa Rica, dated September 24.

There can be no doubt that the energetic action of the United States and Mexico prevented what might have been a prolonged struggle. Disastrous it must have been, for war—whether it be on a large or a small scale—is an evil and is only tolerable when unavoidable.

The happy and joint actions of Presidents Roosevelt and Diaz show the vast influence for peace that our larger states possess and the result of this peaceable intervention shows power to be not a danger but a means of unmixed good if wisely used.

MR. ROOT'S SOUTH AMERICAN TRIP

The presence of the Honorable Elihu Root, secretary of state, at the third international conference at Rio de Janeiro, on July 31, 1906, and his prolonged visit to the sister republics of the south was an event of more than passing interest, and while it is impossible to estimate accurately at this moment its effect upon the relation of the North to the South, it is little less than a moral certainty that the visit in itself and the friendliness everywhere evidenced will draw the republics into closer relations.

The lack of personal knowledge keeps nations as well as individuals apart and Mr. Root pointed out time and again in his addresses the necessity of personal acquaintance as a prerequisite to friendly and confidential relations; that while commerce was not sentimental it nevertheless flourishes in an atmosphere of friendship and confidence.

In an address delivered July 22, 1906, at Pernambuco, Brazil, Mr. Root declared it to be "the chief function of an ambassador from one country to another to interpret to the people to whom he goes the people from whom he comes." And in this broad and accurate sense of the word Mr. Root interpreted the friendliness of the people of the United States to the peoples of South America, and communicated the hope of every American that the governments of the South American republics may be firmly established upon the basis of law, order and popular desire and that the prosperity of the republics may be unbroken.

Mr. Root pointed out repeatedly that the full development of the material resources of the South could only follow in the wake of law, order and justice; that railroads and manufacturers required the inflow of capital, and that the United States not only wished them well, but that the people of the United States were sincerely desirous to contribute financially and materially to the republics of the South.

The message of peace and goodwill was received as sincerely and graciously as it was given, and it was no idle compliment of the mayor of Lima, who impressively and truly said in his address of welcome to Mr. Root:

You are an ambassador of peace, a messenger of goodwill, and the herald of doctrines which sustain America's autonomy and strengthen the faith in our future welfare.

The speeches incident to the visit of Secretary Root to South America have been published in a public document, and with the various addresses and responses before him the reader may forecast for himself the probable and far-reaching consequences of the visit of the Secretary of State to the South American republics during the months of July, August and September.

THE NEWFOUNDLAND FISHERIES

The fisheries question is as perennial and inexhaustible as the fish which the skippers of Gloucester would fain catch off the shores of Newfoundland. Could the fish be persuaded to haunt our coasts instead of throwing themselves away against the shores and bays of an inhospitable if not wholly unappreciative island; or could our fishermen be forced to read the fable—for it must surely be only a fable—of the fox and the grapes, and then persuaded to follow the wise moral of that tale, or if Newfoundland could be annexed to this country; or finally, if this country could be annexed in some way to or absorbed by Newfoundland, then and not till then can we hope to obtain a fair and satisfactory solution of the fisheries.

The question, difficult enough in itself, is complicated by patriotism and a strong and manly local sentiment which makes New England unwilling to yield a tittle of its just rights. Canada and Newfoundland were won jointly by British and Colonial bravery and devotion; the fisheries were enjoyed in common until the outbreak of the Revolution, and in the treaty of peace of September 3, 1783, by which the mother country recognized the independence of the headstrong if not erring colonies, the fisheries were partitioned as an empire would be divided.

ARTICLE III. It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fisherman shall have liberty to dry and cure fish in any of the

unsettled bays, harbours and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

So matters stood, thanks to the insistence of Adams and Jay, through whose efforts the third article was incorporated into the treaty, until the unfortunate and indecisive war of 1812, by which fishing was interrupted, and was put an end to, by a treaty in which the rights of American fishermen found no place. Henry Clay had been rash enough in a burst of unprophectic enthusiasm to talk of dictating peace from the heights of Halifax, but on sober second thought and after two years of not over-successful war on land, despite some glorious victories on sea, he wisely sheathed the sword he never drew, and signed as negotiator the treaty of Ghent (December 24, 1814): a treaty in which the cause of the war—impressment of American seamen—was not mentioned and which left the fisheries unsettled and unmentioned. New Orleans, then unfought, was a glorious triumph but it did not then nor has it since yielded fish.

It is not meant so suggest that the American negotiators—among whom were the younger Adams, Bayard, Russell and Gallatin in addition to Clay—were unmindful of New England and its peculiar interests: they were unable to force a declaration that the fishing rights continued unaffected by the war and they were equally unwilling to consent to a renunciation of the right. The subject was therefore passed over in silence and left for future negotiation.

It was not to be supposed that the sailors of New England would forego the right of fishing in the waters of Newfoundland, merely because the treaty of Ghent was silent on the subject. The war put an end to the danger and the skipper put to the island as in times past. The Old Englander, however, was as set in his ways as the New Englander, and contended that, as the right to fish was gained by a treaty, it was lost by the termination of the treaty which gave rather than acknowledged the right. Indeed the ink had scarcely dried on the treaty before an incident occurred which drew forth in sharp contrast the opposing and irreconcilable views of the two countries. On the nineteenth day of June, 1815, the British sloop *Jaseur* warned an American fisherman, while still some forty-five miles from Cape Sable, not to come within sixty miles of the coast of Newfoundland. John Quincy Adams, then minister to Great Britain protested that the treaty of peace of 1783

was not, in its general provision, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties.

He assimilated the treaty to a delimitation of boundaries which does not lapse by war, as it is intended to and does actually set up a permanent state of things.

To this contention the Colonial Secretary, Lord Bathurst, replied at length, and as the view then expressed has continued to be the definite formulation of British policy in the matter of the fisheries, it is advisable to quote the material portions of this important state paper:

To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties * * * The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. * * * The nature of the liberty to fish within British limits, or to use British territory, is essentially different from the right of independence, in all that may reasonably be supposed to regard its intended duration. * * * In the third article [of the treaty of 1782–83], Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the *liberty* to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and independent as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognized independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself. (I Moore's International Law Digest, p. 771.)

Fish was, however, a local if not a national necessity, and what could not be got as a right must be got as a favor. Accordingly, the convention of 1818 was negotiated, by which American fishermen were accorded certain privileges and a modified participation in the Newfoundland fisheries in consideration of an express renunciation of the rights claimed and exercised under the treaty of 1783.

As this convention is at once the source and the measure of the present right of fishing within the territorial waters of Newfoundland, it is important to set out in full the provisions of Article I of this convention.

WHEREAS, differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States

shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly on the southern coast of Labrador, to and through the straits of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; Provided however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

The various and succeeding agreements have long since been abrogated, namely, the reciprocity treaty of 1854, which was terminated March 17, 1866; the treaty of Washington of May 8, 1871, expired on July 1, 1885, in consequence of notice given by the United States and the fishing rights and privileges acquired under its various clauses came to an end; the elaborate treaty proposed and negotiated in 1888, during Mr. Cleveland's first administration, was not ratified by the Senate. The convention of 1818 is, therefore, in force, and as it was an unsatisfactory compromise in 1818 it is today unsatisfactory. The disputes between American fishermen and Newfoundland authorities are many and frequent, and of such a nature at times to ruffle the good feeling and friendly relations that should exist between English speaking communities.

It will be noted that in the convention of 1818 Americans were permitted to take fish within a marine league of certain specified portions of the coast; and that they were to enjoy the liberty "in common with the subjects of his Britannic majesty." What does the expression "in common" mean? Does it mean that the Americans are to enjoy the same rights of fishing subject to the same local regulations as the subjects of his Britannic majesty? Or does it mean a right to take fish under the treaty and solely according to the regulations prescribed by treaty? If this latter be the meaning, it is evident that the American, gaining

a right by treaty, could only lose the right or have it modified by a treaty to which the United States is a consenting party. If the American fishermen possess the right in common, that is no greater or no less of a right than the Briton, it follows that as the right of the Briton is affected by local statute or regulation, the right of the American can be so varied. If, on the contrary, the right of the American is a treaty right, it can only be modified by diplomatic not by local regulation.

If men and nations were perfect and if national and local jealousy did not exist, the origin of the right would make little or no difference because local regulations would be reasonable and framed solely in the interest of the fishermen and the fish.

If, however, local prejudice should exist, local ordinances could easily impose a regulation which, while seemingly equitable, would bear heavily on the American and discriminate against him. Local fishermen use Newfoundland as a basis; American fishermen cannot so use the island as a basis and must fish many miles from home. By forbidding the sale of bait; by compelling the use of certain kinds of fishing gear, by limiting the seasons arbitrarily within which fishing can be lawfully pursued; by forbidding Sunday fishing, and by preventing the recruiting or transshipment of crews within the three mile limit, or finally by forbidding Newfoundlanders from shipping on a foreign fishing vessel, the local authorities could place the American fishermen at such a disadvantage as materially to affect the profits of the calling.

If, on the other hand, the rights of American fishermen can only be varied by diplomatic agreement, it follows that local ordinance and regulation could only affect British subjects.

Newfoundland has consistently held that the right of fishing "in common" is subject to local regulation, and local legislation has attempted to discriminate against American competition by imposing one and all of the above so-called regulations. The United States adopts the treaty theory, namely, that American rights of fishing can only be controlled, regulated and modified by diplomatic negotiations between the United States and Great Britain.

To suspend the operation of oppressive local legislation, Mr. Root negotiated, on October 8, 1906, the *modus vivendi*, printed elsewhere, which will prevent if possible the occurrence of untoward incidents during the present season. It is to be hoped that a permanent *modus* may be reached by which the rights of American and Briton may be clearly defined and safeguarded in the future. It is not enough that we eat our fish in peace; the fisherman must be permitted to catch the fish with safety to his person and property.

THE NATURE OF THE GOVERNMENT IN CUBA

The resignation of President Palma and his cabinet consequent upon the success of the open and armed rebellion against his government, and President Roosevelt's appointment of Charles E. Magoon as provisional governor, have led to no little comment and query as to the international status of the Cuban republic.

A consideration and understanding of a few elementary facts and principles dissipate any reasonable doubt.

The present government, while termed provisional to distinguish it from the ordinary and settled government under officials elected or selected by Cuba, is a constitutional government just as truly as was the government of Palma.

It is constitutional because it is provided for and is in strict accordance with the exact letter and spirit of the Cuban Constitution, promulgated May 20, 1902, which states, in express terms in Annex III, that

the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

It follows from this article that the United States possesses the constitutional right to intervene in the affairs of Cuba for certain clear and well-defined purposes, and that the government established by such intervention is the government prescribed and therefore recognized by the Constitution of Cuba. Governor Magoon, appointed by the United States, governor of Cuba to effectuate these specified purposes, is the Cuban constitutional executive.

In the next place the act of the President of the United States in intervening and appointing Magoon governor, is not only constitutional according to the Cuban Constitution, but it is lawful according to the laws of the United States, because an act of Congress of the United States, approved March 2, 1901, commonly known as the Platt Amendment, recognized and stated this right of the United States to intervene in the exact language of Annex III of the Cuban Constitution already set forth. As a matter of fact and of history, this clause of the Cuban Constitution was the exact language of the act of Congress of March 2, 1901, and it was incorporated bodily into the Cuban Constitution.

Nor does the lawfulness of the transaction stop here, for in the treaty between the United States and Cuba concluded May 22, 1903, ratified by the President June 25, 1904; ratifications exchanged July 1, 1904, and

proclaimed July 2, 1904, the language of the act of Congress of March 2, 1901, and of Annex III, of the Cuban Constitution, appears in the exact words of the law and the Constitution in Article III of the treaty (*Treaties in Force*, 1904, p. 954). The lawfulness of the intervention appears from two laws of the United States, the act of Congress and the treaty, and as the President "shall take care that the laws be faithfully executed" (Constitution, Art. II, sec. 111), it follows that the President was not only permitted but by the Constitution and his oath the duty was imposed upon him to intervene in obedience to the laws with whose execution he was charged.

The act of the President in intervening and appointing a provisional governor and government was not only constitutional according to the Constitution of Cuba, but was lawful according to the laws of the United States, and the provisional government established and now existing in Cuba in pursuance of the Cuban Constitution, is the constitutional government of Cuba. It is therefore the government of Cuba; it is not the government in any sense of the United States. It follows, therefore, that Cuba is in possession of its own government and is not occupied by the United States.

Such is the theory of the intervention and such is the actual status. This republic of Cuba exists as a separate and independent international entity; its diplomatic ministers and consuls remain under the provisional government; foreign ministers and consuls remain in Cuba as under the administration of Palma, and exercise their ordinary and legitimate functions as if no change had occurred.

The American minister remains in Havana to represent the interests of the United States and to serve as the intermediary between the provisional government of Cuba and the United States.

The personnel of the government has changed; the constitutional administration of Palma has been succeeded by the no less constitutional government of Magoon and the Cuban republic is intact.

THE JAPANESE SCHOOL QUESTION

The establishment of separate schools for Japanese students and the exclusion of Japanese students from the ordinary public schools of San Francisco by local ordinance based upon a law of the state of California raises the question of the rights and privileges of Japanese subjects in the United States under the treaty of November 22, 1894, concluded between the United States and Japan.

Viewed in the light of the treaty the question is one of international law; from the standpoint of the Californian authorities the question is

one of constitutional law involving the relation of the state of California to the United States and the rights granted to the United States on the one hand and the rights reserved to the state, and therefore the states on the other. In numbers the Japanese involved are but a handful; but the principles involved and invoked concern the law of nations and the Constitution of the United States. While the seriousness of the contention precludes a summary treatment by way of comment, a paragraph may well state the issue and the authority upon which it is sought to be supported.

The Japanese claim the right accorded to the most favored nation by virtue of Article I of the treaty of 1894, the material portion of which is as follows:

The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their person and property. * * *

In whatever relates to rights of residence and travel * * * the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than natural citizens or subjects of the most favored nation. (Treaties in Force, 1904, pp. 474-5.)

The Japanese contend that the rights and privileges of education are necessarily incident to residence and travel, and that the rights and privileges specified in the article are the same, not equivalent privileges, liberties and rights enjoyed by native citizens or subjects or citizens or subjects of the most favored nation. British and German subjects are not segregated; and therefore the most favored nation treatment precludes other and different treatment from that of subjects of great Britain and Germany. This the local ordinance and statute of California deny them by establishing separate schools, and excluding them from the other public schools of San Francisco. Therefore, local ordinance and state statute are, it is contended, in violation of the express provision of Article I of the treaty, and as a treaty is superior to local ordinance and state statute it necessarily follows that the local ordinance and state statute are overridden by the treaty. To sustain this contention Article VI, clause 2, is pointed to, which reads as follows:

This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

That a treaty made under the authority of the United States; that is, by

by the coöperation of the President and two-thirds of the senators present (Constitution, Article II, clause 2) is supreme and supersedes the provisions of state constitutions and statutes, inconsistent with the treaty is established doctrine. (*Hamilton v. Eaton*, 1796, 2 *Martin's N. C. Rep.* 83, per Ellsworth, C. J.; *Ware v. Hylton*, 1796, 3 *Dall.* 199; *Hauenstein v. Lynham*, 1879, 100 *U. S.* 483; *People v. Gerke*, 1855, 5 *California*, 381.)

The California authorities contend, on the other hand, that the treaty does not give expressly or by implication the right to education in public or private schools, for education is not in any just or proper sense of the word incidental to travel or residence. If, however, such right can be claimed under the treaty, California insists that the Japanese have the right in question inasmuch as they are furnished equivalent if not identical school facilities. It is also maintained that the Japanese cannot claim greater rights under the treaty than those enjoyed by native born American citizens and as segregation of colored and Indian children is not regarded as an unconstitutional discrimination against the specified classes, the Japanese cannot well claim identical as distinct from equivalent school facilities.

A less substantial argument is that Article II of the treaty of 1894 expressly subjects the Japanese to the police powers:

It is, however, understood that the stipulations contained in this and in the preceding Article [I] do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two conventions.

The police power was not, it is said, expressly or impliedly granted; hence it resides in the states in accordance with Amendment, Article X:

The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people.

It should not be forgotten, however, that the treaty-making power was confided by the Constitution to the President and two-thirds of the Senators present, and that the treaty-making power, as recognized by the Constitution is the treaty-making power existing in Great Britain at the framing of the Constitution. The framers in using a technical expression used it, unless otherwise specified, in the technical sense of English jurisprudence. As the term is used without qualification or limitation of any kind, it follows that the treaty-making power is sovereign and is not subject to limitations placed upon other powers exercised by the government. In a word, the exercise of the treaty-making power which the people, not the states, possess is vested in the organ of

the people for this purpose—the President and Senate, and it is either by its nature or in fact unlimited.

From the summary of the arguments for and against the action of the San Francisco authorities, it will be seen that the question is intricate and technical, and the decision of a test case in state or federal court will be awaited with uncommon interest.

CHRONICLE OF INTERNATIONAL EVENTS¹

COMMENCING JANUARY 1, 1906

WITH REFERENCES

Abbreviations: *Ann. Sc. Pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *G. B. Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journa; *J. O.*, Journal Officiel, Paris; *Mem. dipl.*, Memorial diplomatique, Paris; *Monit.*, Molniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, *Staatsblad*, The Hague; *State Papers*, British and Foreign State Papers, London; *Stats. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

January, 1906.

- 1 GERMANY. Law of December 20, 1905, takes effect, granting Great Britain, her colonies and dependencies most favored nation treatment until December 31, 1907. *Arch. dipl.*, 97: 148.
- 1 GREAT BRITAIN. Aliens Act, August 11, 1905, 5 Edw. 7. ch. 13, came into operation. *Arch. dipl.*, 97:129; *Smith: British nationality and naturalization*, *Juridical R.*, October, 1906; *Henriquez: Law of aliens and naturalization*, London, 1906; *Sibley & Elias: The Aliens Act and the Right of Asylum*, London, 1906; for regulations under this Act see *G. B. Cd.*, 2879.
- 1 SWITZERLAND. New tariff containing conventional rates of treaties with Germany and Italy took effect.
- 1 UNITED STATES. Proclamation, issued under the authority conferred by the third section of the tariff act of the United States, approved July 24, 1897. Reciprocity with Switzerland, taking effect January 1, 1906. Switzerland had decreed the removal, on and after January 1, 1906, of all differential customs duties from the products of the soil and industry of the United States, and granted to the same the benefit of the Swiss conventional tariff rates. *Stats. at L.*, vol. 34.

¹Secretaries of international bureaus, conferences and associations are invited to send to the compiler, Mr. Henry G. Crocker, Washington, D. C., data suitable for this department. To insure accuracy such data should be communicated only after the events.

January, 1906.

- 2 SERBIA—TURKEY. Treaty of commerce signed. *Arch. dipl.*, 97:152.
- 9 BULGARIA—GERMANY. Ratifications exchanged at Berlin of convention of commerce, customs and navigation, signed August 1, 1905. *Arch. dipl.*, 97:149; *Reichs-G.*, 1906, No. 1; *For. rel.*, 1906. See *January 14*.
- 10 ARGENTINE—BRAZIL. Ratifications exchanged at Rio de Janeiro of trademark convention signed at Rio de Janeiro, October 30, 1901; approved by Brazilian Congress, November 28, 1905. *B. A. R.*, April; *Annales dipl. et consulaires*, 3:348.
- 10 BELGIUM—FRANCE. Ratifications exchanged at Paris of convention concluded at Paris, April 12, 1905, for the rectification of the frontier along the Ry-de-France. *J. O.*, January 23, p. 441. French law approving same, January 5. *J. O.*, January 9, p. 169. The convention contains reciprocal cessions of territory. Ratified by Belgium, January 10, 1906. *Monit.*, January 26, 1906; *B. Usuel*, January 10, 1906.
- 10 FRANCE—GREAT BRITAIN. Ratifications exchanged at Paris of agreement signed April 20, 1904, additional to convention of December 8, 1882. Postal money orders. *Treaty ser.*, 1906, No. 1; *J. O.*, January 27.
- 10 SAN MARINO—UNITED STATES. Treaty of extradition, signed at Rome, to take place of the unperfected treaty of March 15, 1905.
- 10 FRANCE—GREAT BRITAIN. Ratifications exchanged at Paris of convention signed at Paris, December 6, 1905. Telegraphic communication between Mauritius and Reunion. *Treaty ser.*, 1906, No. 2; *J. O.*, January 27.
- 10 CHINA. Chinanfu, capital of the province of Shantung, formally opened to foreign trade. The Imperial Decree was issued May 17, 1904. For diplomatic correspondence and regulations for the port, see *For. rel.*, 1904, 1905. For list of treaty ports in China, see *U. S. Monthly Consular Trade Reports*, September, 1906, and *Moore: Dig. Int. Law*, Washington, 1906, Sec. 806. For cities subsequently opened to international trade, see *Times*, December 19, 21, 22.
- 10 CUBA. Adhesion to Pan-American convention of January 27, 1902, approved by Senate. Exchange of official publications. *Ga. Oficial*, January 26, 1906. For ratifications of this convention by other countries, see *R. de dr. int. privé*, 2: 248.
- 10 CUBA. Adhesion to Pan-American convention of January 27 1902. Patents, designs and trademarks. *Ga. Oficial*, January

January, 1906.

27, 1906. For ratifications of this convention by other countries, see *R. de dr. int. privé*, 2:248.

- 12 AMERICAN SOCIETY OF INTERNATIONAL LAW organized.
- 13 BULGARIA—FRANCE. Treaty of commerce and navigation signed at Sofia. Act authorizing ratification by France, April 30. *J. O.*, May 4, p. 3057; *Arch. dipl.*, 97:151; *For. rel.*, 1906. Took effect provisionally, January 14, 1906.
- 13 BULGARIA—ITALY. Treaty of commerce, customs and navigation, signed at Sofia. *R. di dr. int.* (Rome) 1:72,482; *For. rel.*, 1906.
- 13 GERMANY—NETHERLANDS. Ratification by Netherlands of treaty signed at The Hague, December 17, 1904. Status and treatment of subjects of each state residing in domain of the other. *Staatsb.*, 1906, No. 4.
- 14 BULGARIA. New customs tariff as modified by conventions with Great Britain, Germany, France, and Italy, took effect. *Reichs-G.*, 1906, No. 1; *G. B. Cd.*, 2862; *B. Usuel*, January 12, 1906; *Arch. dipl.*, 97:151; *For. rel.*, 1906. See *September 15*.
- 15 BRAZIL—PERU. Tribunal of arbitration under treaty signed July 12, 1904, commenced proceedings. *Mem. dipl.*, June 3.
- 15 PERU—SPAIN. Proclamation by president of Peru of convention signed in Lima, April 9, 1904. Liberal professions. Ratified by Peruvian Congress, December 29, 1905. *B. Min. Rd. Ext.*, Lima, Year 3, No. 9.
- 16 ALGECIRAS CONFERENCE opened. President, Duke of Almodovar, Spanish minister of foreign affairs. Thirteen states were represented. The chief matters of controversy were the control of the proposed state bank and the policing of the port towns. France having lent nearly all of the money borrowed from foreign financiers by the Maghzen, wished to be predominant in the bank administration; Germany contended that the bank should not be used for political purposes nor controlled by one nation. France desired also to control the police. For declaration (Great Britain-France) respecting Egypt and Morocco, April 8, 1904, see *N. R. G.*, 32:15; *G. B. Cd.*, 1952; for declaration (France-Spain) concerning integrity of Morocco, October 3, 1904, see *N. R. G.*, 32:57; *B. Min. Est.*, Madrid, October 1904. For history of the Moroccan question, see *Arch. dipl.*, 96:559; 97:43, 98, 262, 270, 295, 358, 359; *La Conférence d'Algésiras*, Paris and Nancy, 1906; *Moulin: La Question marocaine d'après les documents du livre jaune*, Paris, 1906, 77 pp.;

January, 1906.

- G. Gray: Questioni diplomatiche e sociali dell'anno 1905*, Turin, 1906; *Gamazo: La cuestión de Marruecos desde el punto de vista español*, Madrid, 1905; *R. dr. pub.*, 23:532 (Lapradelle); *Bekker: España y Marruecos, sus relaciones diplomáticas durante el siglo XIX*, Madrid, 1903; *For. rel.*, 1905; *Guarini: La questione del Marocco e Guglielmo II. R. di dr. int.* (Rome) 1:56; *Isambert: La vie politique en Allemagne* (1905-1906), *Ann Sc. Pol.*, 21:731. See April 7.
- 17 VENEZUELAN officials prohibit M. Taigny, French chargé d'affaires, from landing again in Venezuela, and also expel the heads of the French cable offices at Caracas and La Guayra. See *January 18*.
- 18 FRANCE—VENEZUELA. M. Maubourguet, Venezuelan chargé d'affaires, is handed his passports; he is escorted to the Belgian frontier by a special commissary of police. *Arch. dipl.*, 97:156; *Arch. dipl.*, 97:291, for Venezuelan position; *Franklin: L'incident du Venezuela, Q. dipl.*, February 1, 1906.
- 18 ITALY—SWITZERLAND. Two conventions signed at Rome in execution of Art. 15 of the convention of December 2, 1899. Telegraphic, telephonic, and police service at Domodossola. See *May 25*.
- 19 BELGIUM. Promulgation of law of July 7, 1905, approving obligatory arbitration treaties concluded with Russia, October 17/30, 1904; Switzerland, November 15, 1904; Norway and Sweden, November 30, 1904; Spain, January 23, 1905; Denmark, April 26, 1905; and Greece, April 19/May 2, 1905. *Monit.*, January 19, 1906; *B. Usuel*, January 19; *For. rel.*, 1905.
- 20 FRANCE—ITALY. Arrangement signed at Paris. Transfer of funds between Italian and French savings banks. French law authorizing ratification, August 3, 1906. *J. O.*, August 8, p. 5645; *Arch. dipl.*, 97:147.
- 23 BOLIVIA—PERU. Protocol modifying postal agreement of July 12, 1902. Ratified by president of Peru, January 30, 1906. *B. Min. Rel. Ext.*, Lima, Year 3, No. 11.
- 23 BOLIVIA—PERU. Ratification by Peru of treaty signed at Lima, November 27, 1905. Commerce and customs regulations. Ratified by President of Peru, January 27, 1906. *B. Min. Rel. Ext.*, Lima, Year 3, No. 11. For treaty, see *For. rel.*, 1905.
- 25 ARGENTINE REPUBLIC. Decree. Regulations under act of September 29, 1905, organizing the diplomatic service. *B. del Min. de Relac. Ext.*, No. 91.

January, 1906.

- 25 ARGENTINE REPUBLIC. Decree. Consular regulations under act of September 29, 1905, reorganizing the consular service. Under this law there are three classes of consuls general and three of consuls. Article 2 enacts that the executive power shall assign these officials according to the importance of the posts, taking into account protection of Argentine citizens and interests. The regulations state that promotions will be made preferably within the same consular body without prejudice however to such direct appointments as the executive power may deem desirable. *B. del Min. de Relac. Ext.*, No. 91.
- 25 BELGIUM. Arrêt of the Court of Cassation. Nature of marriage contracts of the royal family. *R. de dr. int. privé*, 2:558; *J. de dr. int. privé*, 32:416; *id.*, 33, 940.
- 25 ITALY—NICARAGUA. Treaty of friendship, commerce and navigation signed.
- 28 FRANCE—RUSSIA. Arrangement signed at St. Petersburg supplementary to convention of commerce signed September 16/29, 1905. *Arch. dipl.*, 98:256, 272. See *February 20*.
- 29 DENMARK. King Christian IX. died. Born April 8, 1818. Succeeded by his oldest son, Frederick VIII., proclaimed January 30; his second son, George, is king of Greece; his eldest daughter, Alexandra, queen of England; his second daughter, Marie Dagmar, empress dowager of Russia. King Haakon of Norway is son of Frederick VIII. See *June 22*.
- 31 GREAT BRITAIN—JAPAN. Convention signed at Tokyo. Commercial relations between Canada and Japan. Ratifications exchanged at Tokyo, July 12, 1906. *Treaty ser.*, 1906, No. 13. Extends the stipulations of the treaty signed July 16, 1894, and of the supplementary convention signed July 16, 1895, to intercourse between Canada and Japan.

February, 1906.

- 5 NETHERLANDS—PORTUGAL. Ratification by Netherlands of arbitration treaty signed at The Hague, October 1, 1904. *Staatsb.*, 1906, No. 18.
- 8 CRETE consented to the payment of 20,000 francs as indemnity for the family of an Italian soldier killed in January, 1906. Italy had occupied the country where the crime took place, and sequestered customs duties.

February, 1906

- 9 PERU. Ratification of international treaty signed December 21, 1904, at The Hague. Hospital ships. Approved by the congress of Peru, October 25, 1905. *B. Min. Rel. Ext.*, Lima, Year 3, No. 9.
- 11 AUSTRIA-HUNGARY-ITALY. Convention signed at Rome, to take effect March, 1, 1906, for the acquisition and possession of property, real and personal, by the subjects of either power in the territory of the other. Ratifications exchanged at Rome, February 28, 1906. *Ga. Uffiziale*, February 28, 1906; *R. dr. int. privé*, 1906, p. 810; *R. di dr. int.*, 1:246.
- 11 AUSTRIA-HUNGARY-ITALY. Treaty of commerce and navigation signed. Ratifications exchanged at Rome, February 28, 1906. *Ga. Uffiziale*, February 28, 1906; *R. dr. int. privé*, 1906, p. 811; *R. di dr. int.*, 1:239.
- 11 FRANCE. Encyclical of Pope Pius condemning the French separation law. The law of December 9, 1905, on the separation of church and state abrogated the Concordat of the 26th Messidor, year IX (1801). For the history of the matter, see *Lavergne: Chronique budgétaire et législative* (1905), *Ann. Sc. Pol.*, 1906, p. 383; *Arch. dipl.*, 97; 165, 234, 252; *J.O.*, July 31, 1904, p. 4828; *Doc. dipl., Saint-Siège: la Séparation de l'Eglise et de l'État en France, Exposé et documents*, Rome, typ. vat., 1905; *Despagnet, La République et le Vatican 1870-1906*, Paris, 1906; *R. of Reviews*, January 1907. See August 10.
- 12 AUSTRIA-HUNGARY-BELGIUM. Treaty of commerce and navigation signed at Vienna. Also final protocol. Ratified by Belgium, March 1; ratifications exchanged at Vienna, March 5, 1906. *Monit.*, March 2 and 8; *B. Usuel.*, March 1, 1906.
- 13 GREAT BRITAIN-NICARAGUA. Ratifications exchanged at London of treaty signed April 19, 1905, at Managua. Extradition. *Treaty ser.*, 1906, No. 7.; *Arch. dipl.* 98: 326.
- 14 GERMANY-SWITZERLAND. Ratifications exchanged at Berne of treaty signed at Berne, August 16, 1905. *Reichs-G.*, 1906, No. 10. German customs stations at Basle.
- 15 AUSTRIA-HUNGARY-RUSSIA. Treaty of commerce and navigation. Ratified by Russia, February 12/26. *Dr. d'auteur*, 29:4.
- 16 GREAT BRITAIN. Order in council. Administration of Southern Nigeria placed under that of Lagos, the whole colony to be known as Southern Nigeria. *London Ga.*, February 20, 1906.

February, 1906.

- 16 ITALY—SAN MARINO. Convention signed at Rome supplementary to the convention of friendship of June 28, 1897. Ratifications exchanged July 18, 1906. Proclaimed by the king of Italy, July 29, 1906. *Ga. Ufficiale*, August 20, 1906; *B. del Min. Aff. Esteri*, August, 1906; *R. di dr. int.*, 1: 480.
- 16 SPAIN. Two royal decrees extending to July 1, 1906, rights under Tariff B of Swiss-Spanish commercial convention of July 13, 1892, to countries extending most favored nation treatment to Spain. *Ga. de Madrid*; *Arch. dipl.*, 97: 210.
- 19 DENMARK—UNITED STATES. Ratifications exchanged at Washington of the supplementary convention of extradition signed November 6, 1905, at Washington; ratification advised by the Senate, December 7, 1905; ratified by the President, February 13, 1906; ratified by Denmark, December 14, 1905; proclaimed by the President, February 19, 1906. This convention extends the operation of the treaty of January 6, 1902, to the island possessions and colonies of the respective nations and adds the crime of bribery to the list of extraditable crimes. *Stats. at L.*, vol. 34.
- 20 FRANCE—RUSSIA. Ratifications exchanged at St. Petersburg (French act approving and decree promulgating, February 23), of convention of commerce and navigation signed at St. Petersburg, September 16/29, 1905. Modifying and supplementing treaty signed at St. Petersburg, March 20/April 1, 1874. "Especially, every favor and facility, every immunity and every reduction in customs duties, general or conventional, that either contracting party accords a third power permanently or temporarily, gratuitously or for consideration, will be, immediately and without conditions, reservations or compensation, extended to the products of the soil and industry of the other." In force, February 16/March 1, 1906. *J. O.*, February 24, p. 1249; February 25, p. 1273; *Ann. Sc. Pol.*, September, 1906.
- 21 BELGIUM—FRANCE. Convention signed at Paris. Reparation for injuries resulting from workmen's accidents. Ratifications exchanged at Paris, June 7, 1906. A system of reciprocity established in respect of indemnities due. French decree promulgating same, June 12. *J. O.*, June 14, p. 4013; *Monit.*, June 14, 1906; *Cuba: B. Dep. Est.*, August, 1906; *R. dr. int. privé*, 1906, pp. 804, 805.
- 21 FRANCE—NETHERLANDS. Convention signed at The Hague additional to convention of April 6, 1904, signed at The Hague, to

February, 1906.

- prolong to January 1, 1907, time provided for installation of cable between Saigon and Pontianak. French law authorizing ratification April 20; Dutch law, July 9; ratifications exchanged at The Hague, August 15, 1906; promulgated by Netherlands, August 20. *J. O.*, April 24, p. 2761; *Staatsb.*, 1906, Nos. 196, 227.
- 22 GERMANY—SERVIA. Ratifications exchanged of treaty of commerce of November 16/29, 1904. To take effect, March 1, 1906. *Reichs-G.*, 1906, No. 9; *Arch. dipl.*, 97: 152.
- 22 GERMANY—UNITED STATES. Reichstag passes government's proposal to extend reciprocal tariff rates to United States until June 30, 1907. See *February 26*.
- 23 INTERNATIONAL EASTERN QUESTION ASSOCIATION. Conference held at London. Appealed to signatory powers of treaty of Berlin, 1878, and to the United States "to formulate a scheme to be imposed upon the Sultan as will secure just and humane government in every Turkish province." *Times*, February 24.
- 240.S. ROUMANIA—RUSSIA. Treaty of commerce and friendship signed at Bucharest. Ratified by Russia, March 17/30. Ratifications exchanged, March 30/April 12 at Bucharest. Took effect same date and is to be in force until December 18/31, 1917. For text, see *Mem. Dipl.*, July 8 and 15.
- 26 GERMANY. Law granting to the United States, from March 1, 1906, the same customs rates as are conceded to (1) Belgium (treaty signed June 22, 1904, supplementary to treaty of commerce and customs signed December 6, 1891); (2) Italy (treaty signed December 3, 1904, supplementary to treaty of commerce, customs and navigation signed December 6, 1891); (3) Austria-Hungary (treaty signed January 25, 1905, supplementary to treaty of commerce and customs signed December 6, 1891); (4) Russia (treaty signed July 28, 1904, supplementary to treaty of commerce and navigation signed February 10, 1894); (5) Roumania (treaty signed October 8, 1904, supplementary to treaty of commerce, customs and navigation signed October 21, 1893); (6) Switzerland (treaty signed November 12, 1904, supplementary to treaty of commerce and customs signed December 10, 1891); (7) Servia (treaty signed November 29, 1904, supplementary to treaty of commerce and customs signed August 21, 1892). *Reichs-G.*, 1906, No. 11; *For. rel.*, 1906. See *February 27*.

February, 1906.

- 27 FRANCE—GREAT BRITAIN. Protocol signed at London, modifying the convention of November 16, 1887, respecting the New Hebrides and islands leeward of Tahiti. See *October 20*.
- 27 UNITED STATES. Proclamation, issued under authority of sec. 3 of the tariff act, approved July 24, 1897, Reciprocity with Germany, to take effect March 1. *Stats. at L.*, vol. 34. Germany had, November 29, 1905, denounced the commercial agreement signed July 10, 1900, for March 1, 1906. *Arch. dipl.* 97: 148; see *Wolff: Der deutsch-amerikanische handelsvertrag, die cubanische zuckerproduktion und die zukunft der zuckerindustrie, mit zahlreichen statistischen tabellen und exkursen*, Jena, 1906; *Cuba: B. Off. Dep. Est.*, August, 1906. Germany had taken action, extending on and after March 1, 1906, and until June 30, 1907, or until further notice, the benefit of the German conventional customs tariff to the products of the soil or industry of the United States. See *February 26* and *March 1*.
- 27 INTERNATIONAL COUNCIL FOR THE EXPLORATION OF THE SEA. Fifth meeting held at Amsterdam. Adjourned March 3. *G. B. Cd.*, 3165.

March, 1906.

- 1 AUSTRIA—HUNGARY. New customs tariff as modified by commercial treaties with Germany, Russia, Italy, Belgium, and Switzerland, took effect. *G. B. Cd.*, 2917; *Arch. dipl.*, 97: 149.
- 1 GERMANY. New customs tariff went into effect. See *February 26*.
- 1 ROUMANIA. New customs tariff as modified by treaties with Great Britain (see *March 17*) and Germany, took effect. *G. B. Cd.*, 2828.
- 1 RUSSIA. New customs tariff as modified by treaties with Germany (July 15/28, 1904; ratifications exchanged February 28, 1906), Austria-Hungary, and France, took effect. *For. rel.*, 1905; *G. B. Cd.*, 2857. See *February 20*.
- 8 EGYPT—SUDAN. Finances, administration, and condition. The Earl of Cromer's annual report on the progress made in the various administrative departments of the Egyptian government during the year 1905, calling attention to the expediency of abolishing the capitulations. *G. B. Cd.*, 2817; *J. O.*, December 28, 1905, p. 7637; *The Egyptian Capitulations and their Reform*, *Juridical R.*, July, 1906; *Dicey: The Story of the Capitulations, Nineteenth Century*, July, 1906.

March, 1906.

- 8 DENMARK—NETHERLANDS. Ratifications exchanged at The Hague of treaty of obligatory arbitration signed February 12, 1904, at Copenhagen. Promulgated by Netherlands, March 15, 1906. *Staatsb.*, 1906, No. 47; *Arch. dipl.*, 98:50.
- 11 ARGENTINE REPUBLIC. Death of Señor Dr. Don Manuel Quintana, President since October 12, 1904.
- 17 GREAT BRITAIN—ROUMANIA. Ratifications exchanged at Bucharest of treaty signed October 18/31, 1905. Commerce and navigation. *Treaty ser.*, 1906, No. 3. For adhesions of British colonies and protectorates see *Times*, December 21.
- 19 GERMANY—GREAT BRITAIN. Agreement respecting boundary from Yola to Lake Chad, signed at London by Anglo-German commission on basis of surveys. By exchange of notes at Berlin, dated July 16, 1906, this boundary was accepted by the respective governments. *Deutsches Kolonialblatt*, September 15; *G. B. Cd.*, 2684-46; *Treaty ser.*, 1906, No. 17.
- 19 ITALY. Adhesion for the colony Eritrea to the international agreements signed at Washington, June, 15, 1897, relative to exchange of letters and packages with declared value. To take effect April 1, 1906. *J. O.*, April 29, p. 2929; *Monit.*, April 15, 1906.
- 20 CUBA—GERMANY. Ratifications exchanged at Havana of parcels-post convention signed June 15, 1905. *Ga. Oficial*, April 2, 1906.
- 21 BELGIUM—SALVADOR. Commercial convention signed. Favored nation treatment in commerce, customs and navigation, excepting concessions by Salvador to other Central American republics. *Annales dipl., et cons.*, 3:350.
- 24 ITALY—SWITZERLAND. Three conventions signed at Rome in execution of Articles 2 and 15 of the convention of December 2, 1899, and articles 20 and 21, of the universal postal convention. Customs, postal and sanitary police service at Domodossola. See *May 25*.
- 29 RUSSIA. Note relative to the convocation of a second conference of peace at The Hague. *For. rel.*, 1905, 1906.
- 30 BELGIUM. Royal decree ruling the costume of consuls and commercial agents. *Monit.*, April 12; *B. Usuel*, March 30.
- 31 FRANCE—HAITI. Protocol signed at Port-au-Prince extending the operation of the commercial convention signed July 31, 1900, until October 30, 1906. Decree of president of France embodying same, May 18, 1906. *J. O.*, May 23, p. 3561.

March, 1906.

- 31 ROUMANIA—UNITED STATES. Convention signed at Bucharest. Reciprocal protection of trademarks. Ratification advised by the Senate May 4, 1906; ratified by the President, May 10, 1906; ratified by Roumania June 20, 1906; ratifications exchanged at Bucharest, June 21, 1906: proclaimed by the President, June 25, 1906. *Stats. at L.*, vol. 34.
- 31 ECUADOR—FRANCE. Exchange of ratifications at Quito of act signed at Quito, August 1, 1905, additional to the postal convention of August 17, 1899. Proclamation by president of France, April 14, 1906. *Memoria del Min. de Rel. Ext.*, Quito, 1906; *J. O.*, April 18, p. 2584.

April, 1906.

- 4 FRANCE—ITALY. Exchange of ratifications at Rome of two conventions signed June 6, 1904, at Rome. Railway communication between Coni, Vintimille, and Menton. French act authorizing ratification, March 20, 1906. *J. O.*, March 21, p. 1809; May 5, p. 3118.
- 6 GREAT BRITAIN—HAITI. Convention respecting nationality signed at Port-au-Prince. Ratifications exchanged at Port-au-Prince, October 16, 1906. *Treaty ser.*, 1906, No. 16.
- 6 UNITED STATES. An act to provide for the reorganization of the consular service of the United States. The act provides for grading the service, substitution of salaries for fees, temporary transfer of consular officials by president, appointment of five inspectors of consulates, and further Americanization of the service. It also abolishes personal fees except as to consular agents and empowers the president to fix rates for certifying invoices. *Stats. at L.*, vol. 34, p. 99; see *Documents*, post.
- 7 INTERNATIONAL. Final act of the conference of Algeciras. Supersedes convention of July 3, 1880. Signatory powers: Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Morocco, Netherlands, Portugal, Russia, Spain, Sweden and United States. Of the fifteen shares in the proposed bank, France is to have three; the other nations represented in the conference one each. The banks of England, France, Spain, and Germany are each to appoint one censor. France for five years is to officer the police of Mogodor, Saffi, Mazagan and Rabat; Spain those of Tetuan and Larache; France and Spain together those of Tangier and Casablanca, all subject to a Swiss

April, 1906.

inspector. Police officers are to be responsible to the Sultan and to the diplomatic corps. Importation of contraband of war is prohibited, and the "open door" adopted. *Catellani: L'Italia dopo la Conferenza di Algeiras, R. Coloniale*, 1:1; *G. B. Cd.*, 3087; *Morocco: The International Conference at Algeiras, Imp. and Asiatic Quarterly R.*, October, 1906. For the proceedings of the conference, see *Arch. dipl.*, 99:48. See *June 18, December 5, 14 and 31.*

- 7 FRANCE—KONGO. Act signed at Brussels additional to the telegraphic convention concluded June 23, 1903. Ratifications exchanged at Brussels, June 26, 1906. Promulgated by the president of France, July 13, 1906. *J. O.*, July 17, p. 4918.
- 7 SIXTH UNIVERSAL POSTAL CONGRESS at Rome. One copy only of the various acts was signed by the delegates of the countries concerned and deposited in the Italian state archives by the Italian foreign office. Adjourned May 26. The international letter weight unit was raised from half an ounce to an ounce. For use as return postage, an international stamp for five cents is provided for, exchangeable for a stamp of equal value in any country of the postal union. *L' Union Postale*, vol. 31, Nos. 7, 8 and 9.
- 11 CUBA—FRANCE. Ratifications exchanged at Havana of industrial property convention signed at Havana, June 4, 1904. French act authorizing ratification, February 28; promulgated in France May 12. *Ga. Oficial*, April 13, 1906; *J. O.*, March 6, p. 1485; *id.*, May 16, p. 3402.
- 11 FRANCE. Act amending decree of September 21, 1793, reserving coast trade to national flag. *J. O.*, April 14, p. 2450; *R. de dr. int. privé*, 2:597.
- 14 BELGIUM—MONTENEGRO. Ratifications exchanged at Brussels of extradition convention signed December 8, 1905, at Brussels and December 3 (O. S.) at Cettinje. *Monit.*, April 30, May 1, 1906; *B. Usuel*, April 14.
- 14 FRANCE. Act relative to conditions of application of Article 12 of convention of February 13, 1904, between France and Siam. French consular jurisdiction. *J. O.*, Apr. 21, p. 2665. For the convention, see *For. rel.*, 1905, p. 835.
- 14 THIRD INTERNATIONAL CONGRESS OF EMPLOYEES convened at London. *Times*, April 16.

April, 1906.

- 19 FIFTEENTH INTERNATIONAL CONGRESS OF MEDICINE, Lisbon. The next Congress will be held at Budapest in 1909. For proceedings, *B. Dep. Estado*, Cuba, 1906. Adjourned April 26.
- 19 ERITREA. Decree of governor repealing Decree of December 20, 1904, prohibiting importation of American cottonseed.
- 21 ECUADOR—FRANCE. Promulgation of French law approving postal money order convention, signed June 10, 1905. *J. O.*, April 24, p. 2762.
- 21 GREAT BRITAIN—UNITED STATES. Convention signed at Washington, providing for the surveying and marking out upon the ground of the 141st degree of west longitude, where said meridian forms the boundary line between Alaska and the British possessions in North America. Ratification advised by the Senate April 25; ratified by the President July 10; ratified by Great Britain June 9; ratifications exchanged at Washington August 16; proclaimed by the President August 21, 1906. *Stats. at L.*, vol. 34; *Treaty ser.*, 1906, No. 9.
- 22 OLYMPIC GAMES at Athens. Closed May 2.
- 27 CHINA—GREAT BRITAIN. Convention signed at Peking. Tibet. Ratifications exchanged at London, July 23, 1906. *Treaty ser.*, 1906, No. 9; *For. rel.*, 1906. This confirms the Tibetan convention, signed at Lhasa, September, 1904, negotiated by Sir. F. Younghusband. China engages not to permit any foreign nation to annex Tibetan territory, or interfere in the administration of Tibet; Great Britain binds herself not to do so. Concessions in Tibet shall not be granted to any state or subjects thereof other than China. The telegraphic connection with India provided by the 1904 convention is, however, permitted. The indemnity of twenty-five lakhs is payable in three equal annual instalments, the first of which was paid in Calcutta, May 29. *Imp. As. Quart. R.*, July, 1906.
- 27 GUATEMALA. Decree of legislative power ratified Pan-American sanitary convention of October 14, 1905. *B. A. R.*, September.
- 29 MILAN INTERNATIONAL EXHIBITION is opened. Closed November 4.
- 30 ECUADOR. Executive decree of President ratifying Pan-American Sanitary Convention of October 14, 1905. *Memoria del Min. de Rel. Ext.*, Quito, 1906; *B. A. R.*, June.

May

- 1 INTERNATIONAL EXHIBITION of textile industries, Tourcoing, France. *Times*, April 19; *Mem. dipl.*, June 10.

May, 1906.

- 2 BELGIUM—DENMARK. Ratifications exchanged at Brussels of treaty of obligatory arbitration, signed at Brussels, April 26, 1905. *Monit.*, May 18, 1906; *B. Usuel*, May 2, 1906; *For. rel.*, 1905; *Arch. dipl.*, 98:41. See *January 19*.
- 4 DENMARK—GREAT BRITAIN. Ratifications exchanged at London of convention signed at London, October 25, 1905. Arbitration. Similar to British-Franco treaty of October 14, 1903. *For. rel.*, 1904, p. 9; *Treaty ser.*, 1906, No. 5; *Arch. dipl.*, 98: 44.
- 4 GREAT BRITAIN—TURKEY. British government's ultimatum to Turkey demanding withdrawal of Turkish troops from the territory in dispute (Sinai peninsula) within 10 days. Turkey claimed the area north of a straight line from Akaba to Suez and east of a line from Suez to El Arish. See *May 12*.
- 5 COLOMBIA—ECUADOR. Convention signed in Bogotá, to secure stability of telegraphic intercommunication. Ratified by Ecuador. *Memoria del Min. de Rel. Ext.*, 1906, p. 25.
- 5 SIXTH INTERNATIONAL CONGRESS OF APPLIED CHEMISTRY at Rome. *Times*, May 8. Next meeting at London.
- 7 GREAT BRITAIN—SPAIN. Treaty signed at London. Marriage of His Majesty the King of Spain with H.R.H. Princess Victoria Eugénie Julia Ena. Ratifications exchanged at London, May 23. *Treaty ser.*, 1906, No. 6; *Ga. de Madrid*, May 30; *Arch. dipl.*, 98:322; *Clunet*, 33:938.
- 8 BRAZIL—NETHERLANDS. Treaty signed at Rio de Janeiro fixing boundary line between Brazil and Dutch Guiana. In accordance with this treaty the frontier follows the watershed of the Tumucumaque mountains from headwaters of Maroni river to those of Corentyne, near which the line meets the frontiers of French and British Guiana. *B. A. R.*, July.
- 8 GERMANY—SWEDEN. Treaty of commerce and navigation signed at Stockholm. Ratifications exchanged June 23, 1906. *Reichs-G.*, 1906, No. 36.
- 9 CHINA. Imperial decree appointing Tieh-liang administrator-general and Tang-Shao-yi assistant administrator of the entire customs of China, including the Imperial Chinese Maritime Customs, under Sir Robert Hart, whose entire staff, Chinese and foreign, is placed under their control. The Chinese government has declared in reference to this that they have no intention of departing from the loan agreements of 1896 and 1898, which stipulate that as long as the conditions are in operation the adminis-

May, 1906.

tration will be maintained as hitherto under the control of Sir Robert Hart. *G. B. Cd.*, 3089, 3263; *North China Herald*, October 26, 1906; *For. rel.*, 1906; *Times*, May 10; *R. H. Graves*: Sir Robert Hart in *Review of Reviews*, September.

- 9 GREAT BRITAIN—KONGO. Agreement signed at London modifying the agreement of May 12, 1894, signed at Brussels. *Treaty ser.*, 1906, No. 4. Lease of Bahr el Ghazel to Kongo is canceled except as regards the Lado enclave. Facilities to be given Kongo for construction of railroad to Lado, with commercial port at terminus, for free navigation of upper Nile and free transit over Egyptian Sudan.
- 10 JAPAN—UNITED STATES. Ratifications exchanged at Tokyo of copyright convention signed at Tokyo, November 10, 1905. Ratification advised by the Senate February 28, 1906; ratified by the President March 7, 1906; ratified by Japan April 28, 1906, proclaimed by the President May 17, 1906. *Stats. at L.*, vol. 34; *Publisher's Weekly*, February 10, 1906.
- 10 NEWFOUNDLAND. An Act respecting foreign fishing vessels. It provides that: (1) no alien not so entitled by treaty or convention shall fish in the waters of this colony; (2) no British subject shall fish in any foreign fishing vessel in the waters of this colony; (3) no British subject shall leave the colony for the purpose of joining a foreign vessel to fish in its waters; (4) no fishing gear shall be sold, hired or lent by any British subject to any foreign fishing vessel, the penalty in each case to be fine or confiscation of the vessel. "All foreign fishing vessels exercising rights under any treaty or convention shall be amenable to all the laws of the colony not inconsistent with any such rights." *Documents*, post; *Times*, Oct. 9. See *October 8*.
- 10 RUSSIA. Duma is opened. See *July 21*.
- 12 ITALY—PORTUGAL. Exchange of notes concerning protection of the rights of authors. *Dr. d'auteur*, October, 1906. *B. della proprietà intellettuale*, No. 3, July 15, 1906.
- 12 TURKEY accepts Great Britain's demands for evacuation of Sinai peninsula and the appointment of a mixed commission to fix the frontier, *i.e.*, a line running from a point not less than three miles west of Akaba to Rafeh. *G. B. Cd.*, 3006; *Geographical J.*, September, 1906; *Times*, May 5. The Earl of Cromer describes the Sinai peninsula and refers to certain proposed measures for its improvement in *G. B. Cd.*, 2817. See *October 1*.

May, 1906.

- 15 BELGIUM—FRANCE. Declaration signed at Brussels, with the view of determining the delimitation and fixing the boundaries of the frontier along the Department of Meurthe-et-Moselle. Decree of President of France promulgating same, May 31. *J. O.*, June 2, p. 3778; *Monit.*, July 27, 1906; *B. Usuel*, May 31, 1906. The declaration approves the procès-verbaux signed at Longwy-Bas, July 20, 1903.
- 17 JAPAN—UNITED STATES. Supplementary convention for the extradition of criminals, signed at Tokyo; ratification advised by the Senate June 22; ratified by the President June 28; ratified by Japan September 22; ratifications exchanged at Tokyo September 25, proclaimed September 26, 1906. *Stats. at L.*, vol. 34. Supplementary to treaty signed April 29, 1886; it adds embezzlement of private moneys or property and larceny to the list of crimes for which extradition may be granted.
- 19 DENMARK—SPAIN. Ratifications exchanged at Madrid of general treaty of arbitration signed in Madrid, December 1, 1905. *Ga. de Madrid*, May 30, 1906. All differences that shall arise and not be settled by diplomacy shall be referred to the permanent tribunal of The Hague; disputes involving vital interests and independence excepted. *Arch. dipl.*, 98:46; *Lovtidende*, June 18, 1906.
- 21 MEXICO—UNITED STATES. Convention signed at Washington respecting the distribution of waters of the Rio Grande. Ratification advised by U. S. Senate June 26, 1906; ratified by the President December 26; ratified by Mexico January 5, 1907.
- 22 DENMARK—ITALY. Ratifications exchanged of general arbitration convention signed at Rome, December 16, 1905. Proclaimed by king of Italy May 27, 1906. *Ga. Ufficiale*, July 18, 1906; *B. del Min. Aff. Esteri*, July, 1906; *Arch. dipl.* 98:48; *Lovtidende*, 1906, p. 578. "The high contracting powers bind themselves to submit to the permanent court of arbitration established at The Hague by the convention of July 29, 1899, all differences of whatever nature that may arise between them and which cannot be solved by diplomacy whether originating before or after the conclusion of the present convention. * * * It is understood that unless the controversy bears on a convention between the two states or is a case of denial of justice, [this agreement] will not apply between a claimant subject to one of the parties and the other contracting state when, according to the law of that state, its courts are competent to adjudicate." *Arch. dipl.*, 98: 48.

May, 1906.

For comparative comment on this convention see *Fusinato*: Gli ultimo progressi dell'arbitrato internazionale. *R. di dr. int.*, 1:16.

- 25 ITALY—PERU. Extension of consular convention of June 11, 1896, to June 11, 1907. *B. del Min. de Rel. Ext.*, Lima, Year 3, No. 11.
- 25 ITALY—SWITZERLAND. Ratifications exchanged at Rome of the five conventions signed January 18, 1906, and March 24, 1906. Proclaimed by king of Italy June 7, 1906. *Ga. Ufficiale*, July 3, 1906; *B. del Min. d. Aff. Esteri*, July, 1906.
- 26 FRANCE—MEXICO. Ratifications exchanged at Mexico of postal money order convention signed at Mexico May 10, 1905; French law approving April 21, 1906; promulgated by president of France July 19, 1906. *J. O.*, April 24, p. 2762; *id.*, July 21, p. 5119; *B. A R.*, September.
- 26 HOLY SEE—KONGO. Convention signed at Brussels. *Arch. dipl.*, 99:5.
- 28 PERU—UNITED STATES. Parcels-post convention signed at Washington. To take effect September 1. Ratified by the President May 29. *Stats. at L.*, vol. 34; *B. Min. Rel. Ext.*, Lima, Year 3, No. 11.
- 29 FRANCE—GREAT BRITAIN. Convention respecting the delimitation of the frontier between British and French possessions to the east of the Niger. Ratifications exchanged at London, August 29, 1906. Adhering to the general line as fixed in January, 1904, and confirming protocol signed at London, April 9, 1906. France secures the whole eastern shore of Lake Chad. *Treaty ser.*, 1906, No. 14; *Geographical J.*, November, 1906; *J. O.*, September 29, p. 6598; *G. B. Cd.*, 2684-46.
- 29 UNITED STATES. Ratification by president of Pan-American sanitary convention, signed October 14, 1905, by delegates of eleven countries. *B. A. R.*, June. Ratification advised by the Senate February 22. This convention and referendum was concluded at the second general international sanitary convention of the American Republics October 9-14, 1905, held in Washington. *Transactions 2d int. san. con.*, Washington, *G. P. O.*, 1906; *U. S. Congressional Record*, 40:340. For other ratifications, see *April 30, July 6, August 19, August 23*.
- 30 LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION. Twelfth annual meeting held at Lake Mohonk Mountain House, Mohonk Lake, N. Y. President Hon. John W. Foster. Three

May, 1906.

hundred members were in attendance; and six sessions held the conference adjourning June 1. The conference discussed the present status of international arbitration, the education of public opinion, creation of an international congress; work in universities and among business men, etc.

- 31 DENMARK—FRANCE. Ratifications exchanged at Copenhagen of convention of permanent arbitration signed at Copenhagen September 15, 1905. French decree promulgating same June 26, 1906. *J. O.*, December 28, 1905, p. 7635; *id.*, June 30, p. 4435, *Cuba: B. Dep. Est.*, August, 1906; *Arch. dipl.*, 98:43; *Lovtidende*, 1906, p. 576. Text identical with British-Franco convention of October 14, 1903.

June, 1906.

- 1 HONDURAS. New consular tariff takes effect. *B.A.R.*, July.
- 3 KONGO. Decrees of King Leopold passing into law the recommendations of the reform committee appointed to advise upon the best means of giving effect to proposed reforms in the Kongo State. Subjects: (1) The occupation of the land; (2) direct personal taxation; (3) collective taxation; (4) carrying of arms; (5) state warehouses stocked with merchandise suited to native wants; (6) native chiefdoms; (7) hiring service; (8) recruiting for the public service; (9) justice; (10) police and military operations; (11) infractions of public order; (12) currency; (13) state inspectors; (14) trading societies; (15) functions of civil officers; (16) tutelage of native children; (17) technical schools; (18) national domain; (19) sale of public lands; (20) council of the Kongo (advisory); (21) public debts; (22) officials; (23) study of rubber culture; (24) tax on caoutchouc des herbes; (25) sleeping sickness. Also an open letter from King Leopold to the secretaries of the committee in answer to criticisms of Kongo administration. *B. Officiel de l'État indépendant du Congo*, June, 1906; *Times*, June 11, 1906. The reform committee was appointed by King Leopold by decree of October 31, 1905, to study the conclusions of the report of the commission of inquiry (Oct. 30, 1905), and to formulate necessary plans and practical means of executing them. For the report of the commission of inquiry, see *B. Officiel de l'État indépendant du Congo*, Sept.—Oct. 1905; *Report of the Commission of Enquiry in the Congo Free State*, translated by E. A. Huybers, Brussels, 1905. On the history, administration, ques-

June, 1906.

tion of intervention, etc., see Descamps: *L'Afrique nouvelle*, Paris and Brussels, 1903; Wack: *The Story of the Congo Free State*, New York, 1905; *The Truth about the Civilisation in Congoland*, London, 1903; Mille: *le Congo léopoldien*, Paris, 1905; MacDonnell: *King Leopold II., his rule in Belgium and the Congo*, London, 1905; Lejebure: *Le régime des concessions au Congo*, Paris, 1904; Cattier: *Étude sur la situation de l'État indépendant du Congo*, Brussels and Paris, 1906; Bourne: *Civilisation in Congoland*, London, 1903; U. S. Senate, 49th Cong., 1st Session, Ex. doc., 196; G. B. Cd., 1913, 2333, 3002; De Mares: *The Congo*, Brussels, 1904; Nys: *The Independent State of the Congo and the General Act of Berlin*, Brussels, 1903; *The Congo Free State Administration, Imp. and As. Quart. R.*, October, 1906; Leonard: *The Congo Question: a case of humanity*, id.; Morel: *Red Rubber*, London, 1906.

- 3 GUATEMALA—ITALY. Ratifications exchanged of the consular convention signed at Guatemala, November 13, 1905. Proclaimed by the king of Italy June 14, 1906. *Ga. Ufficiale*, August 14, 1906; *B. Min. Aff. Esteri*, August, 1906; *R. di dr. int.*, 1:385.
- 4 EGYPT—GREECE. O. S., May 22. Commercial convention.
- 5 INTERNATIONAL CONGRESS OF EDITORS. Fifth reunion at Milan. Adjourned June 10. *Dr. d'auteur*, July, 1906.
- 7 COLOMBIA. Accession to Geneva convention of August 22, 1864, for the amelioration of the condition of the wounded in armies in the field. *Treaty ser.*, 1906, No. 8.
- 11 RED CROSS CONFERENCE. Geneva. Called for the purpose of revising the convention of August 22, 1864. See *July 6*.
- 13 ECUADOR—ITALY. Ratifications exchanged at Quito of treaty of friendship, commerce and navigation signed at Quito, August 12, 1900. Approved by Ecuador, September 30, 1902; proclaimed by president of Ecuador, July 15, 1906; proclaimed by the king of Italy September 1, 1906. Reciprocally granting favored nation treatment. *Memoria del Min. de Rel. Ext.*, Quito, 1906, p. 27; *Italy: B. del Min. degli Aff. Est.*, No. 338; *Ga. Ufficiale*, September 22, 1906.
- 14 GREECE—ROUMANIA. Rupture of diplomatic relations. For diplomatic correspondence of the dispute, see *Arch. dipl.*, 99: 9.
- 14 UNITED STATES. An Act to prevent aliens from fishing in the waters of Alaska. *Stats. at L.*, vol. 34, p. 263.

June, 1906.

- 16 ABYSSINIA—GERMANY. Treaty of friendship and commerce, signed at Adis Ababa, March 7, 1905, took effect. *Reichs-G.*, 1906, No. 25; *Arch. dipl.*, 97: 149.
- 16 ITALY—SWITZERLAND. Convention signed respecting fishing in waters common to the two states. *R. di. dr. int.*, 1:361.
- 18 MOROCCO. Decree giving adhesion to the Act of Algeciras. *Q. dipl.*, 10:703.
- 22 NORWAY. Coronation of King Haakon VII. at Trondheim. By a popular vote, 259,936 to 67,554, the people of Norway on November 13, 1905, chose Prince Charles of Denmark as king. The Storting elected him unanimously November 26, 1905. See *January 29*.
- 26 DENMARK—UNITED STATES. Agreement by exchange of notes respecting industrial designs.
- 26 SWITZERLAND—Germany, Austria-Hungary, Belgium, France, Great Britain, Italy, Luxemburg, Netherlands, Peru, Sweden. Protocol signed at Brussels relative to the accession of Switzerland to the international sugar convention signed March 5, 1902. Ratified by Swiss national council June 27, *Mem. Dipl.*, July 1. *State Papers*, vol. 95; *Reichs-G.*, 1903, No. 7. Approved by France August 4, 1906. *J. O.*, August 7, p. 5630. To take effect September 1, 1906. *G. B. Cd.*, 2813; *Reichs-G.*, 1906, No. 41; *Monit.*, July 11, 1906; *B. Usuel*, 1906, No. 157.
- 26 UNITED STATES. Joint resolution of Congress expressing the sympathy of the people of the United States with the Hebrews on account of the massacres of members of their race in Russia. *Stats. at L.*, vol. 34, p. 835; *The Russian government and the massacres*, *Quarterly R.*, October, 1906.
- 27 FRANCE—LUXEMBURG. Treaty signed at Paris relative to workmen's accidents. Ratifications exchanged at Paris, October 19, 1906. *R. dr. int. privé*, 1906, p. 804; *J. O.*, November 15, p. 7605.
- 27 GERMANY—SPAIN. Exchange of notes extending operation of agreement of February 2, 1899, to December 31, 1906. That convention had been denounced by Germany June 27, 1905, to expire June 30, 1906. *Ga. de Madrid*, June 28, 1906. See *December 24*.
- 27 UNITED STATES. Executive Order. Regulations governing consular appointments and promotions. Provides for the merit system of examinations; limits appointments to the lower grades of the service, thence by promotion to vacancies in the higher

June, 1906.

grades, through demonstrated efficiency; creates an examining board, prescribes subjects of examination, and limits eligibility to candidates of American citizenship from 21 to 50 years of age.

- 28 CUBA—FRANCE. Postal convention. Ratifications exchanged in Havana, September 14, 1906. *Ga. Oficial*, Havana, September 17, 1906; *J. O.*, October 25, p. 7213.
- 28 RUSSIA—UNITED STATES. Agreement signed at Peking respecting trademarks in China.
- 29 UNITED STATES. An Act to establish a bureau of immigration, naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States. *Stats at L.*, vol. 34, p. 593. Exclusive jurisdiction to naturalize aliens is conferred upon United States circuit and district courts, and state courts of record having a seal, a clerk, and jurisdiction in actions in which the amount in controversy is unlimited. All certificates of naturalization are to be furnished by the bureau. The alien's declaration of intention must precede his admission by at least two years; when naturalized must be able to speak the English language and must not be opposed to organized government. *B. A. R.*, September, for rules.
- 30 UNITED STATES. An act creating a United States court for China, and prescribing the jurisdiction thereof. The consular courts retain jurisdiction in civil cases to \$300 and criminal cases to \$100 fines. Appeals are granted therefrom to the U. S. court for China, which also exercises original jurisdiction in larger cases. It has supervisory control over the discharge by consuls of their duties relating to estates of decedents in China. It holds sessions in the U. S. consulates at Shanghai (headquarters), Canton, Tientsin, and Hankow, and at any other place permitted by treaty in the discretion of the court. Appeals lie to the U. S. circuit court of appeals of the ninth judicial district. *Stats. at L.*, vol. 34, p. 814. See *Documents*, post.
- 30 BRAZIL. Decree No. 6079, conceding a reduction of 20 per cent in import duties on certain articles when imported from the United States. This decree was issued under authority of Art. 6 of law 1141 of December 30, 1903, and Art. 18 of law 1452 of December 30, 1905. *B. A. R.*, August.

July, 1906.

- 1 FRANCE. Act respecting the application in France of international conventions concerning industrial property. *J. O.*, July 4, p. 4538; *R. dr. int. privé*, 1906, pp. 121, 483, 815.
- 1 SPAIN. New customs tariff came into force. Approved by Royal Decree June 23. See *August 1*. *G. B. Cd.*, 3066.
- 4 GREAT BRITAIN—NICARAGUA. Agreement for direct exchange of parcels by parcels-post. *G. B. Parl. Deb.*, 163:1084.
- 6 RED CROSS CONFERENCE. Geneva. International convention amending convention of August 22, 1864, concluded at Geneva. The original remains in the Swiss archives. *Vannutelli: La revisione della convenzione di Ginevra*. *R. di dr. int.* 1:421; *Mem. dipl.*, June 17, July 15, August 22, 29.
- 6 COLOMBIA—PERU. Modus vivendi agreement, pending ratification of boundary arbitration treaty signed September 12, 1905, in Bogotá. *B. Min. Rel. Ext.*, Lima, Year 3, No. 11. Treaty and complementary act (September 23) and modus vivendi of September 12 and complementary act thereto (September 23) in *For. rel.*, 1905. A general arbitration treaty was also signed in Bogotá, September 12, 1905. "Only questions affecting the independence and honor of the two nations are excepted from this obligation. In case of doubt, this point will also be resolved by compromise. Specifically, national independence and honor will not be considered as compromised in controversies relative to diplomatic privileges, consular jurisdiction, customs and navigation duties, validity, construction and carrying out of treaties, and pecuniary claims, whatever their origin and antecedents * * * the wish of the two governments to give the fullest possible interpretation to the principle of arbitration * * * The sentence does not admit appeal and the carrying out of same is left to the honor of the two nations signing it * * * ten years." *For. rel.*, 1905.
- 7 GUATEMALA. Adhesion to final act of conference of peace of July 29, 1899. Laws of war on land. *Monit.*, July 19, 1906; *B. Usuel*, 1906, No. 169.
- 16 CUBA—SPAIN. Ratifications exchanged at Madrid of treaty of extradition signed October 26, 1905. *Ga. de Madrid*, August 1; *Ga. Official*, August 18.
- 16 HONDURAS—SPAIN. Ratifications exchanged at Madrid of treaty of arbitration signed at Madrid May 13, 1905. *Ga. de Madrid*, August 21.

July, 1906.

- 16 HONDURAS—SPAIN. Ratifications exchanged at Madrid of treaty signed at Madrid May 5, 1905, respecting the practice of liberal professions. *Ga. de Madrid*, August 21.
- 16 MEXICO. President ratified Pan-American sanitary convention of October 14, 1905. The Mexican Senate had approved it May 7, 1906. *B. A. R.*, August.
- 19 BELGIUM—PERU. Consular convention.
- 20 GREECE—NETHERLANDS. Exchange of ratifications of extradition treaty of August 26, 1905.
- 20 GUATEMALA—HONDURAS—SALVADOR. Treaty of peace signed on U. S. S. *Marblehead*. This treaty was brought about by the mediation of Mexico and the United States. *Mem. dipl.*, July 29, August 12, September 2.
- 21 RUSSIA. Ukase dissolving Duma and ordering convocation of a new Duma on March 5, 1907. *Times*, July 23.
- 22 ABYSSINIA—ITALY. Treaty of commerce signed at Adis Ababa. *Mem. dipl.*, July 29; *id.*, October 7.
- 23 INTERPARLIAMENTARY UNION. Fourteenth conference at London. Adjourned July 25. *Davis: The Fourteenth Interparliamentary Conference, Independent*, vol. 61, p. 387; *Davis: the Interparliamentary Union, id.*, p. 126; *Times*, July 24 to 27; *Mem. dipl.*, July 29.
- 23 THIRD INTERNATIONAL AMERICAN CONGRESS, Rio de Janeiro, Mr. Joaquim Nabuco, President. The conference resolved "to ratify adherence to the principle of arbitration; and, in order to render practical so lofty a desideratum, recommends the nations here represented that they instruct their delegates to the second Hague conference to promote in that assembly of universal character the adoption of a general arbitration convention so efficient and definite that, meriting the support of the civilized world, it shall be accepted and put in effect by every nation." The Bureau of American Republics was reorganized, among its new duties being that of recommending and communicating topics for programs of future conferences to the several governments. Its governing board shall be the diplomatic representatives of the American republics at Washington, the Secretary of State of the United States being chairman. Two bureaus for the protection of industrial property, at Rio de Janeiro and Havana, were recommended. The conference also resolved to recommend to their governments "That they consider the point of inviting the second peace con-

July, 1906.

ference at The Hague to study the question of compulsory collection of public debts, and, in general, means tending to diminish among nations conflicts of strictly pecuniary origin." Adjourned August 27. *Dr. d'auteur*, October, 1906; *Drago: La república Argentina y el caso de Venezuela*, Buenos Aires, 1903; *Cuba: B. oficial del dep. de estado*, November; *B. A. R.*, March, April, August, 1906.

- 30 CHILE—GREAT BRITAIN. Agreement, signed at London. Money orders. *Treaty ser.*, 1906, No. 10.
- 30 FRANCE—SWITZERLAND. *Modus vivendi*. Customs. See *October 20*.

August, 1906.

- 1 SPAIN—UNITED STATES. Agreement as to reciprocal tariff concessions, signed at San Sebastian. Art. III: "The present arrangement will enter into effect as soon as the necessary decrees and proclamations can be promulgated in both countries and it will thereafter continue in force until one year after it has been denounced by either of the high contracting parties. Each of the high contracting parties, however, shall have the right to rescind forthwith any of its concessions herein made by it, if the other at any time shall withhold any of its concessions or shall withhold any of its tariff benefits now or hereafter granted to any third nation, exception being made of the special benefits now or hereafter given by Spain to Portugal and those now or hereafter given by the United States to Cuba." See *August 27*, *July 1*, and *December 20*.
- 4 GREAT BRITAIN. An Act to include bribery amongst the extraditable crimes (6 Edw. VII., ch.15). This act was necessary before the treaty signed April 12, 1905, with the United States could be published under British law. See *December 21*.
- 8 CRETE—GREAT BRITAIN. Postal agreement for exchange of money orders. *G. B. Parl. Deb.*, 163:42.
- 10 FRANCE. Encyclical of Pope Pius X. to the archbishops and bishops of France relative to the law of separation of church and state. *Mem. dipl.*, August 19.
- 15 DENMARK—UNITED STATES. Parcels-post convention signed at Washington and ratified by the President same date; signed at Copenhagen, June 30, 1906. *Stats. at L.*, vol. 34.
- 16 ITALY. Proclamation of law authorizing government to give execution to the convention of June 7, 1905, for the creation of

August, 1906.

an international institute of agriculture, having its seat in Rome, and to adhere as a member of the first group. *B. Min. degli Aff. Est.*, No. 338; *Ga. Ufficiale*, September 4, 1906; *Times*, March 5; *L'iniziativa del Re d'Italia e l'istituto internazionale d'agricoltura*, Roma, tip. naz., 1905, 724 pp; *Labra: El Instituto Agrícola Internacional, R. dr. int. y politica exterior*, Madrid, 1:5. The international agricultural conference convened at Rome May 28, 1905. Forty-one countries were represented. *Conférence Internationale d'Agriculture, Procès-verbaux*, Rome, 1905; *G. B. Cd.*, 2958; *For. rel.*, 1905. United States ratification advised by Senate June 27, 1906; ratified by the President July 7, 1906.

- 19 COSTA RICA. President ratified Pan-American sanitary convention of October 14, 1905. *B. A. R.*, September.
- 20 CUBA. Uprisings in provinces of Santa Clara and Pinar del Rio. See *October 23*.
- 23 PERU ratified Pan-American sanitary convention of October 14, 1905.
- 24 GREAT BRITAIN—NICARAGUA. Ratifications exchanged at London of treaty signed April 19, 1905, at Managua, with regard to Mosquito territory. *Treaty ser.*, 1906, No. 11; *For. rel.*, 1905. The treaty of Managua, January 18, 1860, is abrogated, and Great Britain recognizes the absolute sovereignty of Nicaragua over the Mosquito territory. Nicaragua exempts the Mosquito Indians and Creoles born before 1894 from military service and from direct taxation for 50 years, and guarantees them the same rights as are guaranteed by the laws to Nicaraguan citizens.
- 24 GREAT BRITAIN—NICARAGUA. Ratifications exchanged at London of treaty signed July 28, 1905, at Managua, respecting friendship, commerce and navigation. Abolishment of the free port of San Juan del Norte. *Treaty ser.*, 1906, No. 12; *For. rel.*, 1905.
- 27 UNITED STATES. Proclamation issued under the authority of the third section of the tariff act approved July 24, 1897. Reciprocity with Spain, to take effect September 1. *Stats. at L.*, vol. 34. See *August 1*.

September, 1906.

- 1 SPAIN—SWITZERLAND. Treaty of commerce signed at Berne. Laid before Cortes November 10. Ratifications exchanged at Madrid November 19. *Ga. de Madrid*, November 13, 20 and 22.

September, 1906.

- 1 SPAIN. Royal decree. Provisional consular fees to go into force January 1, 1907. *Ga. de Madrid*, September 8.
- 1 CHINA. Imperial edict announcing intention of inaugurating a constitutional government and prescribing preparatory reforms. *Mem. dipl.*, September 16.
- 6 INTERNATIONAL CONGRESS ON TUBERCULOSIS. The Hague. *Times*, August 7, September 8.
- 6 TENTH INTERNATIONAL GEOLOGICAL CONGRESS at Mexico. Adjourned September 14. Next congress at Stockholm in 1909 or 1910, to be decided by the Swedish committee. *B. A. R.*, August; *B. of Amer. Geog. Soc.*, December, 1906.
- 8 ABYSSINIA—BELGIUM. Commercial treaty signed at Adis Ababa. It contains a most favored nation clause. *Times*, September 11.
- 10 INTERNATIONAL COMMISSION for the Study of the Polar Regions instituted in Brussels. *Geographical J.*, October, 1906, p. 403; *Times*, September 11, 12.
- 14 INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY. Ninth congress held at Milan. Adjourned September 16. *Dr. d'auteur*, November, 1906; *Propriété industrielle*, September 30, p. 130.
- 15 FIFTEENTH UNIVERSAL CONGRESS OF PEACE. Milan. Adjourned September 23. The next congress will take place at Munich. For the principal resolutions, see *Mem. dipl.*, September 23 and 30.
- 15 UNITED STATES. Proclamation issued under authority of Sec. 3 of the tariff act approved July 24, 1897, to take effect September 30, 1906. Reciprocity with Bulgaria. Bulgaria had extended on and after June 5, 1906, and until further notice, to the products of the soil or industry of the United States, the benefit of the Bulgarian conventional customs tariff rates, the same being the lowest rates applied by Bulgaria to the like products of any other country. *Stats. at L.*, vol. 34.
- 15 COSTA RICA—GUATEMALA—HONDURAS—SALVADOR. Conference of Central America peace, held in San José. Luis Anderson, minister of foreign affairs of Costa Rica, president. This resulted in (1) a general treaty of peace and friendship, arbitration, commerce, extradition, etc., signed September 25; (2) a convention for the establishment of an international Central American bureau at Guatemala, signed September 25; and (3) a convention for the establishment of a pedagogical institute of

September, 1906.

- Central America, under the general control of Costa Rica, dated September 24. Adjourned September 25. *Conferencia de paz Centro-Americana*: tip. nacional, Costa Rica, 1906, 70 pp.; *B. A. R.*, November, 1906; *Mem. dipl.* December 2; *Diario oficial*, Salvador, October 23.
- 17 INTERNATIONAL DIPLOMATIC CONFERENCE for the protection of the laboring classes. Second conference to consider the formation of treaties regarding labor conditions. Berne. Adjourned September 26. A convention was signed on the latter date concerning night work for women engaged in industrial enterprises. *Yale R.*, November; *Times*, September 27; *Mem. dipl.*, October 7.
 - 19 INSTITUT DE DROIT INTERNATIONAL. Twenty-third session opened at Ghent. Adjourned September 26. Next session at Florence, 1908. *Times*, September 20, 27; *Mem. dipl.*, September 30.
 - 20 CHINA. Edict abolishing use of opium. See *November 21*.
 - 20 INTERNATIONAL GEODETIC CONFERENCE. Budapest. Adjourned September 28. *Geographical J.*, December, 1906.
 - 21 INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION. Eighteenth congress at Bucharest. Adjourned September 27. *Dr. d'auteur*, October 1906; *Times*, September 6.
 - 24 HONDURAS—SALVADOR. Convention signed at San José, Costa Rica, continuing in force for ten years the boundary convention signed at San Salvador January 19, 1895. *R. dipl.*, December 23; *Mem. dipl.*, December 23.
 - 24 INTERNATIONAL CONGRESS OF CHAMBERS OF COMMERCE. Milan. *Mem. dipl.*, October 7.
 - 24 COSTA RICA—GUATEMALA—HONDURAS—SALVADOR. See *September 15*.
 - 25 COSTA RICA—GUATEMALA—HONDURAS—SALVADOR. See *September 15*.
 - 27 INTERNATIONAL ASSOCIATION FOR LABOR LEGISLATION. Fourth general meeting at Geneva. Adjourned September 29. *Yale R.*, November; *Mem. dipl.*, October 7.
 - 28 INTERNATIONAL CONGRESS ON UNEMPLOYMENT. Convention at Milan under the auspices of the Società Umanitaria of Milan. Adjourned September 29. *Times*, March 31.
 - 29 FRANCE—SPAIN. Exchange of notes extending commercial *modus vivendi* to November 2. *Ga. de Madrid*, October 2.

October, 1906.

- 1 EGYPT—TURKEY. Frontier agreement signed. *Times*, October 3; for map see *Geographical J.*, January, 1907. See *May 12*.
- 1 ICELAND. Adhesion to international telegraphic convention signed at St. Petersburg, July 22, 1875. *J. O.*, November 28, p. 7889.
- 1 MEXICO—SALVADOR. Postal money order convention took effect. *B. A. R.*, September.
- 2 INTERNATIONAL LAW ASSOCIATION. Twenty-third conference at Berlin. Adjourned October 5. *Times*, August 22, October 3, 4, 5.
- 3 INTERNATIONAL RADIOTELEGRAPHIC CONFERENCE. Berlin. See *November 3*.
- 6 FRANCE—HAITI. Protocol signed at Port-au-Prince to extend the commercial convention signed July 31, 1900, until January 31, 1907. Ratifications exchanged at Port-au-Prince, October 19, 1906. *J. O.*, November 14, p. 7586.
- 6 FRANCE. Three decrees. Expenses of diplomatic and consular agents. *J. O.*, October 22, pp. 7151, 7152.
- 6-8 GREAT BRITAIN—UNITED STATES. Agreement effected by exchange of notes at London in regard to inshore fisheries on the treaty coast of Newfoundland. Great Britain (1) agrees not to "bring into force the Newfoundland foreign fishing vessels act of 1906 which imposes on American fishing vessels certain restrictions in addition to those imposed by the act of 1905, and (2) also that the provisions of the first part of section 1 of the act of 1905, as to boarding and bringing into port, and also the whole of section 3 of the same act, will not be regarded as applying to American fishing vessels;" and (3) consents to the use of purse seines by American fishermen during the ensuing season, subject to due regard being paid in the use of such implements to other modes of fishery. The American fishermen (1) are not to fish on Sunday; (2) are to comply with the regulation to report at custom houses when physically possible; (3) are to pay light dues; and (4) if Newfoundlanders are shipped this will be done far enough from the exact three mile limit to avoid any reasonable doubt. *For. rel.*, 1906; *McGrath: The Newfoundland Fishery Dispute, North American R.*, December 7, 1906; *Times*, October 9, 10, December 10; *G. B. Cd.*, 3262; *Documents*, post. See *May 10*.
- 7 PERSIA. National Assembly inaugurated at Teheran. *Independent*, November 29.
- 20 FRANCE—GREAT BRITAIN. Convention signed at London confirming New Hebrides protocol of February 27, 1906. *G. B. Cd.*, 3160.

October, 1906.

- 20 FRANCE—SWITZERLAND. Treaty of commerce signed at Berne, to take effect November 20, 1906. It reproduces almost all the provisions of preceding treaties between the two countries or of the recent treaties concluded between Switzerland and her other neighbors. Differences will be decided not by the court of The Hague, but by an arbitral tribunal constituted according to a special rule annexed to the convention. French law authorizing ratification, November 21, 1906; ratifications exchanged at Berne, November 21; in force, November 23, 1906. *Mem. dipl.*, November 25, p. 726; *J. O.*, November 22, pp. 7749, 7754. *Annales dipl.*, November 16, 1906.
- 20 GREAT BRITAIN—SERVIA. Agreement for the exchange of postal money orders. Signed at London, April 3, 1906, and at Belgrade, October 20. To take effect January 1, 1907. *G. B. Cd.*, 3265.
- 22 THIRD INTERNATIONAL CONGRESS for the suppression of white slave traffic. Paris. For international arrangement signed at Paris, May 18, 1904, see *For. rel.*, 1905; *R. de dr. int.* (Madrid), *Cronica*, June, 1905. This convention was ratified by nine contracting powers at Paris, January 18, 1905. Austria-Hungary and Brazil also had adhered at that date. Adjourned October 24.
- 23 UNITED STATES. Executive order. The temporary administration of the government of Cuba, in virtue of the requirements of Art. 3 of the treaty of May 22, 1903, shall be conducted in Havana by the provisional governor subject to the supervision of the secretary of war. *R. of R.*, October, 1906, p. 387; *Brownell: The Cuban Republic on Trial*, *id.*, p. 424; *For. rel.*, 1906; U.S. H. R. Doc. No. 2; 59 Congress, 2 Session; *Independent*, January 3, 1907.
- 25 EGYPT—FRANCE. Ratifications exchanged at Cairo of convention of commerce and navigation signed at Paris, November 26, 1902. *J. O.*, August 10, p. 5677; November 24, p. 7810.
- 30 FRANCE—SPAIN. Exchange of notes extending commercial modus vivendi to December 2. *Ga. de Madrid*, November 1. See *November 29*.

November.

- 1 NEW ZEALAND INTERNATIONAL EXHIBITION opened.
- 3 INTERNATIONAL. Convention signed at Brussels respecting liquors in Africa. Signatory powers: Germany, Belgium, Spain, Kongo, France, Great Britain, Italy, Netherlands, Portugal, Russia and Sweden. *G. B. Cd.*, 3264.

November, 1906.

- 3 INTERNATIONAL radiotelegraphic convention signed at Berlin. Next conference at London, 1911. *Mem. Dipl.*, 696; *Hozier: Wireless Telegraphy, Nineteenth Century*, July, 1906; *Bright: Wireless telegraphy and the conference, Monthly R.*, December, 1906, p. 20. See *October 3*. Signed by Argentine Republic, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Mexico, Monaco, Netherlands, Norway, Persia, Portugal, Roumania, Russia, Spain, Sweden, Turkey, United States, and Uruguay. The contracting states undertake to make arrangements for communication between their coast stations and vessels of all nationalities, whatever system the latter may employ; an international bureau is to be established; certain provisions of the international telegraphic convention signed July 22, 1875, at St. Petersburg, are declared applicable to wireless telegraphy; and arbitration of disputes is provided for.
- 10 BELGIUM—GREAT BRITAIN. Agreement signed at Brussels to facilitate clearance of commercial travelers' samples through their respective customs departments. *Treaty ser.*, 1906, No. 18.
- 10 GUATEMALA—UNITED STATES. Convention signed at Guatemala. Reciprocal protection of patents. Ratified by U. S. Senate, December 13.
- 18 NETHERLANDS—SERVIA. Diplomatic relations, broken off in 1903, renewed.
- 21 CHINA. Regulations giving effect to edict abolishing use of opium, having been drafted by Tang-Shao-yi and approved by council of state, received imperial sanction. One-tenth of the ground now used for the cultivation of the poppy must be used for other purposes each year, under penalty of confiscation, so that no more opium is to be produced at the end of ten years. Every person using opium must be registered and a record kept of the amount he consumes. Only a registered person can buy opium. Persons over sixty years of age will be permitted to continue using it; others must decrease the use at the rate of 20 per cent annually. High officials under sixty must set a date when they will cease the use. Teachers, soldiers and sailors must abstain after three months. Opium dens are to be closed in six months. and the drug will be sold only by government officials on physicians' prescriptions or to authorized persons. *Times*, November 23, *North China Herald*, November 30; *Mem. dipl.*, December 9.

November, 1906.

- 29 FRANCE—SPAIN. Exchange of notes extending indefinitely the existing commercial *modus vivendi* based on most favored nation customs treatment. Expires three months after denouncement. *Ga. de Madrid*, December 1.

December, 1906.

- 1 PORTUGAL—SPAIN. General Act, signed at Lisbon. Demarcation of boundary from mouth of the Miño to the confluence of the Caya and Guadiana. In pursuance of Art. 24 of the Lisbon boundary treaty signed September 29, 1864. *State Papers*, 62: 941. Exchange at Lisbon of notes confirming same, December 1. *Ga. de Madrid*, December 20; *R. dipl.*, December 9.
- 5 MOROCCO. Identical note presented by France and Spain to governments represented at Algeciras conference on the affairs of Morocco. *Times*, December 7; *Q. dipl.*, 10:763.
- 5 CHINA—JAPAN. Agreement signed at Peking for transfer to China of Newchwang. *Times*, December 2 and 7.
- 5 ITALY—ROUMANIA. Treaty of commerce signed at Bucharest. *R. dipl.*, December 9.
- 6 GREAT BRITAIN. Constitution granted Transvaal. *G. B. Cd.*, 3250; *Times*, December 13.
- 10 NOBEL PEACE PRIZE awarded by Norwegian Storting to President Roosevelt. *Times*, December 11. For foundation of the Nobel prizes and rules governing their award, see *Almanach de Gotha*.
- 11 FRANCE. Separation law goes into operation. *Jerrold: France and the Pope's move*, *Monthly R.*, January, 1907; *Ward: The Pope and France*, *Nineteenth Century*, January, 1907; *Bérard: Les cultuelles*, *La Nouvelle R.*, 44:41.
- 13 FRANCE—GREAT BRITAIN—ITALY. Two agreements signed at London respecting Abyssinia. *Times*, December 14; *Q. dipl.*, 10:782; *R. dipl.*, December 16.
- 14 UNITED STATES. Ratification of Act of Algeciras by President; ratification advised by Senate, December 12. For other ratifications see *Q. dipl.*, 10:730 to 763.
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HENRY G. CROCKER.

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¹ When prices are given, the documents in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

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Great Britain, convention between United States and, providing for surveying and marking out upon ground of 141st degree of west longitude where said meridian forms boundary line between Alaska and British possessions in North America, signed at Washington, Apr. 21, 1906, proclaimed Aug. 21, 1906. 3 p. *Dept. of state.*

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Chile, agreement between the United Kingdom and, for the exchange of money orders. Signed at London, July 30, 1906. *Foreign office.* (cd. 3090.) 1½d.

China, convention between the United Kingdom and, respecting the junction of the Chinese and Burmese telegraph lines, being a revision of the convention of Sept. 6, 1894. Signed at Peking, May 23, 1905. *Foreign office.* (cd. 2687.) ½d.

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Columbia, accession of, to the convention signed at Geneva, Aug. 22, 1864, for the amelioration of the condition of the wounded in armies in the field. *Foreign office.* (cd. 3005.) ½d.

Congo, agreement between the United Kingdom and the Independent state of the, modifying the agreement signed at Brussels, May, 12, 1894. signed at London May 9, 1906. *Foreign office.* (cd. 2920.) ½d.

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¹ Official publications of Great Britain, India and many of the British Colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London.

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Nicaragua, treaty between the United Kingdom and, for the mutual extradition of fugitive criminals. Signed at Managua, Apr. 19, 1905. *Foreign office.* (cd. 3001.) 1½d.

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¹Official publications of France may be purchased of Georges Roustan, 5 Quai Voltaire, 7^e, Paris, France.

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PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA
V. WALSHE

194 U. S. Rep. Ed. 205; s. c. 48 L. Ed. 938

This case involved the construction of the treaties of 1842 and 1889, for the extradition of criminals. Article 10 of the treaty of 1842 provides for the reciprocal surrender between the two governments of fugitives from justice, but only

upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed.

Article 1 of the treaty of 1889 named certain other offenses, and participations therein, as extraditable,

provided such participation be punishable by the laws of both countries.

Thomas Walshe, alias James Lynchebaum, was charged with the commission of murder in Ireland. He was arrested by the United States marshal in the state of Indiana on a warrant issued by Commissioner Shields, appointed by a United States court to execute the laws relating to the extradition of fugitives from the justice of foreign countries. The warrant commanded any marshal of the United States to arrest the alleged fugitive from the justice of Great Britain, and to bring him forthwith before the commissioner at his office in the city of New York in order that the evidence of his criminality be heard, and, if the same should be found sufficient, that the charge and the proceedings thereunder be certified to the secretary of state in order that a warrant might be issued for his surrender pursuant to treaty between the United States and Great Britain.

He was arrested in the state of Indiana by the United States marshal for that district. He sued out a writ of habeas corpus before the United States court for that district. In his return to the writ, the marshal avowed his intention to carry the accused directly before Commissioner Shields at his office in New York City. On the hearing, the court dis-

charged the prisoner. From this decision the marshal appealed to the United States Court. It decided:

1. That the treaties of 1842 and 1889 lay at the basis of the litigation, and that the construction of a treaty being drawn in question, the Supreme Court has jurisdiction; that:

The construction of the treaties was none the less drawn in question because it became necessary or appropriate for the court below also to construe the acts of Congress passed to carry their provisions into effect.

2. Walsh could not be extradited under the treaties in question except upon such evidence of criminality as, under the laws of the state of Indiana—the place in which he was found—would justify his apprehension and commitment for trial if the alleged crime had been there committed.

That inasmuch “as there are no common law crimes of the United States,” the stipulations of the treaty for the surrender of fugitives from justice for offenses

punishable by the laws of both countries, meant that the required evidence of criminality must be such as would authorize the apprehension and commitment of the accused for trial in that state of the Union in which he was arrested.

3. That the evidence of the criminality of the charge must be heard and considered by some judge or magistrate authorized by the acts of Congress to act in extradition matters and sitting in the state where the accused was found and arrested.

that by the

proviso in the Sundry Civil act of August 18, 1894; * * * it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest circuit court commissioner or the nearest judicial officer, having jurisdiction, for a hearing, commitment or taking bail for trial in cases for extradition;

that this commissioner or judicial officer

is necessarily one acting as such within the state in which the accused was arrested and found;

that it was competent for the marshal for Indiana to execute within his district the warrant issued, but that it w

his duty to take the accused before the nearest magistrate in that district, who was authorized to hear and consider the evidence of criminality. If such magistrate found that the evidence sustained the charge, then under §5270 of the Revised Statutes, it would be his duty to issue his warrant for the commitment of the accused to the proper jail, there to remain until he was surrendered under the direction of the national government, in accordance with the treaty.

The judgment of the court below was affirmed that the marshal had no authority

to take the prisoner at once from the state in which he was found, and deliver him in New York before Commissioner Shields.

WRIGHT V. HENKEL

190 U. S. Rep. Ed. 40; L. Ed. 948

This case raised the question of identity of statutes, or laws, of the high contracting parties, defining crimes made extraditable by treaty; also the question of the right of admission to bail in extradition cases.

Wright was arrested on a warrant issued by Extradition Commissioner Alexander, of New York, on a complaint made by the British Consul General, charging him with the commission of the crime of fraud, as a director of the London & Globe Finance Corporation. The complaint charged him with knowingly making, circulating and publishing certain reports and statements of accounts of the said corporation, which were false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; and also with altering and falsifying books, papers and writings belonging to said corporation, and with making and concurring in the making of false entries, etc., in the books of the company, with the like fraudulent intent.

Wright applied to the United States district court for the southern district of New York for writs of habeas corpus and certiorari, which were dismissed. From this decision he appealed to the United States Supreme Court. The court decided:

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and, as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be made criminal by the laws of both countries. We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the third paragraph of section 611 of the penal code of New York. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of a company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate, or public company, known to be false by a director, manager, or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. * * * Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

As the state of New York was the place where the accused was found and, in legal effect, the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Con-

gress, and eliminating the operation of the laws of the states. That view would largely defeat the object of our extradition treaties by ignoring the fact that, for nearly all crimes and misdemeanors, the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common law crimes of the United States; and, indeed, in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition.

The court held that:

When by the law of the state in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. * * * The commissioner had jurisdiction, and that brings us to consider whether the commissioner or the circuit court erred in denying the application to be let to bail. * * * We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief.

The court held that no error of record appeared in the refusal to admit to bail; and the order of the district court was affirmed.

STATE OF MISSOURI V. STATE OF NEBRASKA, AND STATE OF NEBRASKA
V. STATE OF MISSOURI

196 U. S., 23, Rep. Ed.; s. c.; Book 49, L. Ed. 372; 197 U. S., 577, Rep. Ed.; s. c.; Book 49, L. Ed. 881

In this case the states of Missouri and Nebraska, respectively, filed a bill and cross bill to settle the question of a boundary line between the two states which had become the subject of controversy through a sudden change in the bed of the Missouri river. After the admission of Nebraska into the Union the river cut a new channel across and through the narrow neck of land at the west end of Island Precinct, about half a mile wide, making for itself a new channel, and passing through what was admittedly, at that time, territory of Nebraska. After the new channel was thus made, the old channel dried up. This change in the bed of the river became permanent. The precise question raised was whether the sudden and permanent change in the course and channel of the river, occurring July 5, 1867, worked a change in the boundary line between the two states. The Supreme Court held:

That the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor

whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. * * * This rule is no less just when applied to public than to private rights. * * * Where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary. * * * The original thread of the stream continues to mark the limits of the two estates.

The court held these principles applicable as well to boundaries of private property, touching on streams, as to boundaries between states or nations found in running water.

Avulsion has no effect on boundary but leaves it in the center of the old channel.

Accordingly the court adjudged:

That the middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5, 1867, is the true boundary line between Missouri and Nebraska.

LOUISIANA V. MISSISSIPPI

202 U. S. Sup. Ct. Rep. 1

This case involved a boundary dispute and its decision depended principally on the construction of various acts of Congress. It grew out of the enforcement of legislation with respect to oyster fishing in the waters of Louisiana and of Mississippi. The court said:

The act of Congress admitting the state of Louisiana (into the Union) gave that state all islands within nine miles of her coast, and the subsequent act of Congress admitting the state of Mississippi purported to give that state all islands within eighteen miles of her shore. Some islands within nine miles of the Louisiana coast were also within eighteen miles of the Mississippi shore, thus furnishing the basis for a boundary controversy.

The islands claimed by Louisiana in this case were all within three leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act yet Mississippi claims thereunder the disputed territory, as being islands within eighteen miles of her shore. If this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to the state of Mississippi. The rule *qui prior est tempore, potior in jure*, applied, and section 3 of article 4 of the Constitution does not permit the claims of any particular state to be prejudiced by the exercise of the power of Congress therein conferred.

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "thalweg" is commonly used by writers on international law in definition of water boundaries between states, meaning the middle or

deepest or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find "*le Thalweg de l'Adige*," "*le Thalweg du Rhin*," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In *Iowa v. Illinois*, 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the states of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two states for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between states is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will, on its side, exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi.

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applicable in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. Martens (F. de),

vol. 1 (2d ed.), p. 134; Hall, § 38; Bluntschli (5th ed.), §§ 298, 299; Oppenheim, vol. i, pp. 254, 255.

Thus Martens writes:

What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry.

So Pradier Fodéré says (vol. ii, p. 202), that as to lakes,

in communication with or connected with the sea, they ought to be considered under the same rules as international rivers.

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In *Devoe Manufacturing Company*, 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two states. The jurisdiction of the state of New Jersey was claimed "to extend down to the bay of New York and to the channel midway of said bay," and this court sustained the claim. See *Hamburg-American Steamship Company v. Grube*, 196 U. S. 407.

In the San Juan water boundary controversy between the United States and Great Britain, Emperor William I. gave the award in favor of the United States, October 21, 1871, by deciding

that the boundary line between the territory of Her Britannic Majesty and the United States should be drawn through the Haro Channel;

and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the secretary of state, the British minister, and the British representative, the boundary line was said to be prolonged until "it reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the Alaskan boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained

the American contention in regard to the thalweg and the island lying south of it.

But counsel contend that the rule

as to the flow of the midchannel or thalweg of the river Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain expires by its own limitations when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico.

This contention is inconsistent, as matter of fact, with the allegation of the cross bill that

the Mississippi Sound was recognized as a body of water six leagues wide, wholly within the state of Mississippi from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico,

and with Mississippi's Exhibit Map A presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester v. Massachusetts*, 139 U. S. 240; *McCready v. Virginia*, 94 U. S. 391.

In *Manchester v. Massachusetts*, the court said:

We think that it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit.

Questions as to the breadth of the maritime belt or the extent of the sway of the riparian states require no special consideration here. The facts render such discussion unnecessary.

Islands formed by alluvian were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be

natural appendages of the coast on which they border, and from which, indeed, they are formed. *The Anna* (1805), 5 C. Rob. 373.

As to these particular waters, the observations of Mr. Hall (4th ed.), p. 129, are in point:

Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water.

He then states the specific case of the Archipiélago de los Canarios on the coast of Cuba, and says:

In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank.

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the *thalweg* in determining the boundary.

Moreover, it appears from the record that the various departments of the United States government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. *Virginia v. Tennessee*, 148 U. S. 503; *Indiana v. Kentucky*, 136 U. S. 479; *Missouri v. Kentucky*, 11 Wall, 395; *Rhode Island v. Massachusetts*, 4 How. 591.

ORTEGA V. LARA

202 U. S. Sup. Ct. Rep. 339

Angela Lara brought an action in the United States district court of Porto Rico to recover damages against Antonio Ortega for breach of promise of marriage. The promise was alleged as having been made June 1, 1901, and the breach in 1904. The plaintiff recovered a judgment, from which the defendant appealed to the United States Supreme Court, which declared the familiar principle that:

By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. In case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States, so far as applicable, would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

At the time of its annexation to the United States, section 44 of the civil code of Porto Rico

provided that under certain conditions "the person who refuses to marry without just cause shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

1. The court decided that this article was repealed by the adoption of a new civil code by the legislature of Porto Rico, in effect on July 1, 1902:

2. Article 44 was a law of Porto Rico on April 12, 1900, and the operation of the Foraker act was to define how it might be amended or repealed. It was repealed by the Porto Rican legislature before the alleged breach of promise. If the district court erred in declining on any ground to apply it as a limitation (to the recovery), the error cannot be corrected on this appeal, because the appeal does not lie. The alleged federal question had no existence in substance. The laws of Porto Rico remain the laws of Porto Rico except as indicated in section 8 of the Foraker act, which did not make all the laws of Porto Rico acts of Congress.

3. That the district court of Porto Rico has jurisdiction of cases in which the parties on both sides are subjects of the king of Spain.

THE UNITED STATES V. THE PAQUETE HABANA

189 U. S. Rep. Ed. 453; 47 L. Ed. 901

This case involved the right of the claimants to recover damages against the naval captors of vessels as prizes of war; and also of the power of a prize court of the United States to render a decree against the United States for the damages and costs sustained by the claimants.

The captured vessels were fishing smacks, engaged in coast fishing for the daily market, and so not subject to capture. During the proceedings, the prize court sitting in the southern district of Florida, ordered that the proceeds of the vessels and cargoes be restored to the claimants with damages and costs; and the question was whether they should be paid by the captors or by the government.

Agreements between the United States, the captors and the claimants were filed with the prize court:

That the damages should be charged against the United States or the captors, or apportioned as to justice may appertain, and as the legal responsibility therefor may appear, saving the right to review the decree as to the amount and as to where the ultimate responsibility rested.

The district court entered decrees against the United States for the amounts, and the United States appealed on the grounds that the decree should have gone against the captors and not against the government.

The Supreme Court, by Mr. Justice Holmes, said:

We do not see how it is possible that a decree should be rendered against the captors. There was no formal intervention by them, and whether a decree can be made against the United States or not, it has so far adopted the acts of capture that it would be hard to say that under the circumstances of these cases it has not made those acts its own. It is not disputed that the United States might have ordered the vessels to be released. It did not do so. The libels were filed by the United States on its own behalf, praying a forfeiture to the United States. The statutes in force seemed to contemplate that form of procedure and such has been the practice under them. The libels alleged the capture pursuant to instructions from the President. The captures were by superior force, so that there was no question that the United States was interested in the proceedings. * * * We are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. * * * Under the circumstances of this case, a decree may properly be entered against the United States. The former decree of this court remains in force, and requires a final decree for damages.

In a case cited,

The court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases. * * * Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment.

Numerous decisions are cited by the court in support of the foregoing propositions.

RIBAS Y HIJO V. UNITED STATES

194 U. S. Rep. Ed. 315; 48 L. Ed. 994

This case raised the question of the right of a subject of one government to recover compensation from another government, with which the former was at war, for the seizure and use of his property by the enemy government as an act of war. The principle involved could not be in doubt, in the present state of international law, according to which, either belligerent government may, as an act of war, in the conduct of

military operations and for military purposes, requisition, seize or impress into its service the goods and chattels of citizens or subjects of the enemy state; and this without any liability to make indemnity for the property so taken in the course of regular warfare.

J. Ribas y Hijo, a Spanish corporation, brought suit against the United States government in the district court of Porto Rico to recover for the use of a merchant vessel taken by the United States authorities, in the port of Ponce, Porto Rico, when that city was captured by the United States army and navy, July 28, 1898.

The vessel was kept and used by the quartermaster's department of the army until some time in April, 1899, when the war department ordered its return to the owner, if all claims for use or damage for detention should be waived. Such conditional return was refused by the captain, who claimed to be a part owner, and with his crew he left the vessel. Subsequently, the consignees of the vessel were notified that it was at their disposal; that the government was about to discharge those having it in care; and they were requested to put someone in control of it. This they declined to do, and the vessel was abandoned, and in August 5, 1899, was wrecked in a hurricane.

The vessel was not seized as a prize of war; was not sent to a prize court; its nationality was Spanish; it was not within any of the declared exemptions from seizure set forth in the proclamation of the President of April 26, 1898.

The district court dismissed the case, which came by appeal to the Supreme Court of the United States, which decided:

According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was, therefore, to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain.

The court decided, moreover, that:

The claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an executive department. Nor can it be said to be founded on contract, express or implied.

Moreover:

The treaty of peace between the two countries provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war."

The judgment of the district court was affirmed.

COLOMBIA V. CAUCA COMPANY

190 U. S. Rep. Ed. 524; 47 L. Ed. 1159

This case involved the following questions:

1. The jurisdiction of the United States Supreme Court over an appeal from a judgment rendered by United States circuit court of appeals against a foreign government which had brought suit against an American citizen.
2. The validity of an award of a tribunal of arbitration, between the foreign government and American citizen, rendered by a majority of the arbitrators, one of them having resigned after the discussions were closed but before the award was rendered.
3. The impeachment of an award as having been given in part in excess of the jurisdiction conferred by the arbitral agreement.
4. The impeachment of an award by one of the parties after that party has received and retains the valuable consideration stipulated in the arbitral agreement.
5. The power of the arbitrators to render an award for the benefit of the assignee of the contract, the assignor, and not the assignee, being a party to the submission.

The decisive facts of the case were these: One Cheery received a concession, with the right of assignment, from the Colombian government to build a railroad. Cheery, for valuable considerations, assigned the concession to the Cauca Company, a West Virginia corporation, organized for the purpose of building and operating the road. Cheery then assigned his contract to the Cauca Company to the Colombian Construction and Improvement Company for certain valuable considerations. The latter company became thereby substituted to his place in his contract assigned to the Cauca Company. The road was not built within the period prescribed in the concession, and the government claimed the forfeiture. The Cauca Company claimed that this failure was due to the fault of the government. The matter became the subject of diplomatic discussion, and culminated in an agreement of arbitration, by the terms of which the Cauca Company surrendered the railroad to the government, which agreed to pay a just indemnity. The arbitration tribunal, styled a commission, consisted of three members, one appointed by Colombia, one by the Cauca Company, and the third by common accord between the secretary of state and the Colombian minister at Washington. The arbitral agreement provided that the commission was to

determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and the proceedings of the parties.

In pursuance of this power, it resolved that all decisions should be by majority vote. At the end of the trial, and before the decision, the Colombian commissioner announced his resignation to the commission. The award was rendered by the other two commissioners. The Colombian government brought suit in the United States circuit court for the district of West Virginia to set aside the award. From an appeal taken from the United States circuit court of appeals to the United States Supreme Court the latter decided:

1. As a foreign government has seen fit to submit its case to the courts of the country with whose citizens its controversy exists, it would be unfortunate if, through any mistakes, it was prevented from carrying questions of law to the court of last resort. We are of opinion that it had the right to appeal. The circuit court had jurisdiction, under the Constitution, article 3, section 2, and the act of August 13, 1888, section 1, 25 Stat. at L., 434, as the suit is "a controversy between citizens of a state and foreign states, citizens or subjects" within the words and meaning of the act. The right to appeal from the decree of the circuit court of appeals is given by the act of March 3, 1891, U. S. Compiled Statutes, 1901, 550, "in all cases not hereinbefore in this section made final."

2. Colombia is put in the position of seeking to defeat the award after it has received the railroad in controversy, and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. The bill offers to pay the undisputed sum but not to rescind the submission and return the railroad.

3. It was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court in the submission. * * * It had itself resolved, under the powers given to it in the agreement, that a majority vote would govern. Obviously, that was the only possible way, as each party appointed a representative of its side. We are satisfied that an award made by a majority was sufficient and effective. Whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed.

4. The main and serious question of the case is whether the scope of the submission was exceeded by any items of the award. * * * The only fair way is to take the language (of the arbitral agreement) in its natural sense, not straining it either way. * * * It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers. When its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down.

Accordingly, the Supreme Court affirmed the award in part, but rejected certain items allowed by the commissioners.

5. It is said that the last named company (the Colombian Construction and Improvement Company) was not a party to the submission, which is true. But the

commission might have reasonably found that this company was the assignee of the contract between Cheery and Cauca Company by which Cheery was to build the road and receive the Cauca Company's stock and bonds. Therefore, the work done by the Construction Company had to be paid for by the Cauca Company, and the result of its work was the railroad which the company surrendered. Under such circumstances we can listen to no hair-splitting as to whether the work done upon the road by the Construction Company can be called the Cauca Company's *obras y trabajos*.

NORTHERN PACIFIC RAILWAY COMPANY V. AMERICAN TRADING COMPANY

195 U. S. Rep. Ed., 439; s. c. 49 L. Ed. 269

This case involved the question of contraband of war as a defense to an action against a common carrier for damages for breach of contract to transport.

A special agreement was made for the transportation of a quantity of lead from New York to Yokohama over intervening routes from New York to Tacoma and by the steamship of the Northern Pacific Steamship Company, due to leave Tacoma October 30, 1894. After the contract and payment of transportation charges were made, the defendant company declined to ship the lead upon the ground that it might be contraband of war. The trading company then notified the railway company that they would hold the company responsible for any loss from its failure to fulfil the contract. It was well understood by the parties before the contract was made that the lead might be considered as contraband of war in view of the war then existing between China and Japan. The deputy collector of the port refused to grant clearance papers to the ship while the lead was on board, which was accordingly unshipped; and this was also urged as a defense by the railway company on the ground that it made the performance of the contract both impossible and unlawful. The court held:

The contract was not unlawful when made. It may be assumed that the lead was contraband of war; but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling. It is legal to export articles which are contraband of war; but the articles and the ship which carries them are subject to the risk of capture and forfeiture. Neither any law of the United States, nor any provision of international law, was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions.

The court held that the mistaken action of the deputy collector in refusing to grant the clearance was an undoubted violation of his duty; that his refusal constituted no defense to the action on the contract,

which was lawful when made and had not become unlawful by any subsequent act of Congress.

It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually in the minds of the parties to the contract, but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and in substance, ratified after it was made. The railway receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it.

The plaintiff sued to recover the difference between the price which the vendor would have received for the lead if the contract of transportation had been performed and the price which the trading company afterward sold it for and which was the best obtainable at the time of the sale.

The court held that the objections made to the recovery were untenable.

MISSOURI V. ILLINOIS

200 U. S., 496

The complainant state brought this suit against the defendant state for an injunction. It involved the right of the state of Illinois and the sanitary district of Chicago to discharge the sewage of Chicago through an artificial channel into the Des Plaines river, and thence, through a tributary stream, into the Mississippi river.

The decision finally turned on the question of fact whether the discharge of the sewage was in the nature of a nuisance, polluting the waters, and rendering them injurious for the uses of the people of the cities and towns of Missouri. The court decided that:

Our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.

The bill was by the court dismissed without prejudice.

Just as the JOURNAL goes to press, a case of great importance and far-reaching in its facts, and involving questions of magnitude, both of constitutional and national law has been argued before the Supreme Court of the United States. We refer to the case of *Kansas v. Colorado*,

involving the use of and control of waters of the Arkansas river, which to a limited extent (as to the jurisdiction of the court) was passed on in 1902 (185 U. S. 125).

The case has now been argued on the merits. The court extended the usual four hours to twelve hours; and the interests of the various parties were argued by numerous and able counsel, including the attorneys-general of Kansas and Colorado and the solicitor-general of the United States.

The grievance of Kansas against Colorado is that Colorado claims the right to impound and use all the waters of the Arkansas river, and that it actually does use all the water; that this use of the water by Colorado has dried up the stream, including the underflow through a large part of Kansas to the great damage of its riparian owners.

Kansas claims that it became a state long prior to the organization of Colorado, and became vested with riparian rights along the river which cannot be taken from it by a state, whose rights are subsequent in point of time.

Colorado maintains that Kansas has no right of action in the absence of injury inflicted or threatened; that the owners of land in Kansas bordering on the river have no rights which Kansas can assert as *parens patriæ*; that under the common law doctrine of riparian rights the inhabitants of lands along the upper reaches of the Arkansas river in Colorado have a right *ex jure naturæ* to the beneficial use of its water to the full extent of their necessities; that irrigation of riparian lands is a right of the common law, which permits the reasonable use without regard to the effect that such use may have in a case of a deficiency upon proprietors lower down the river. In arid lands the irrigation of riparian lands is a necessary use, which gives the upper riparian proprietors an absolute right only limited by their necessities; the doctrines of priority of appropriation for beneficial uses of the water of a river is a doctrine of necessity in an arid country and all settlers on an interstate navigable stream take their rights subject to the rights of the upper riparian proprietors. In the United States a state has exclusive control of its own non-navigable waters within its own territory and may make and enforce such laws in relation thereto as the necessities of its own people require, and this power cannot be taken from it except by amendment of the Constitution.

The United States intervened in the controversy, because of its paramount interest in irrigation as affecting vast tracts of the public lands, because of the federal policy and laws on the subject, and because, as

parens patriæ, the government represents states and individuals who are vitally affected by the issues and are not before the court. If the claim of Kansas based on the common law rule of undiminished flow of waters prevails, or if the claim of Colorado that because of its sovereignty it can wholly exhaust the flow for irrigation prevails, the government cannot carry out the scheme of the reclamation act, which necessarily contemplates a national supervision, regulation and distribution of the waters of interstate streams for beneficial use in irrigation.

How can the government thus deal with a matter of internal regulation apparently within the exclusive and reserved competence of the states? Even if there is no such express enumerated power in the Constitution—and the principle of a power necessarily implied in order to effectuate a power granted hardly seems to embrace this case—the power is not denied by the states or to the people. This is necessarily so, as to the states, because of the very fact of a conflict between two opposed state systems of law. The state acts exclusively in the way of internal police on all persons and things within its borders, but when the effects of state action pass on and affect other states and their inhabitants, then control of the matter is not within state sovereignty. There is a vacancy of interference of power, if the national power as a branch of inherent sovereignty cannot regulate this field and compose such a conflict through its legislation. Some sovereignty must control; the state sovereignties cannot; the national sovereign therefore does, and to do so does not interfere with the exclusive right of the state to deal with persons and things and control affairs wholly confined to its borders.

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED V. THE KING

Law Reports (1905), 2 King's Bench Division, 391

Petition of Right—International Law—Annexation—Liabilities of Conquered State—Creditor's Rights Against Conqueror—Act of State—Jurisdiction of Municipal Courts

A petition of right alleged that before the outbreak of war between the late South African Republic and Great Britain, gold, the produce of a mine in the republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the government of the republic; that the government by the laws of the republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territories of the republic by her late majesty the obligation of the government of the republic toward the suppliant in respect of the gold was now binding upon his majesty the king.

Held, on demurrer, that the petition disclosed no right on the part of the suppliants which could be enforced against this majesty in any municipal court.

There is no principle of international law by which, after annexation of conquered territory, the conquering state becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered state incurred before the outbreak of war.

Petition of Right by the West Rand Central Gold Mining Co., Ltd.

1. The suppliants are a company registered in England under the companies acts and owning and working a gold mine in his majesty's Transvaal colony.

2. On October 2, 1899, 283.90 ounces of gold of the value of £1104, the property of the suppliants, while in transit by train from Johannesburg to Cape Town, were taken possession of at Vereeniging by an official of the late South African Republic, namely, one Hugo, the resident magistrate of the district; the said Hugo was acting upon the instructions of the state attorney of the said republic, who ordered him to take the said gold into safe keeping.

3. The said Hugo gave for the said gold (together with other gold taken at the same time) a receipt of which the following is a translation:

VEREENIGING STATION.

Seized this day by order of the Attorney-General S. A. R. (117) one hundred and seventeen cases containing gold and valuables sealed as usual and conveyed by the mail train from Johannesburg.

(Signed) J. S. N. Hugo,

2 October, 1899.

Res. J. P.

4. Further, two bars of gold weighing 767.20 ounces of the value of £2700, the property of the suppliants, and being then in the custody of the African Banking Corporation of Johannesburg, were on October 9, 1899, taken possession of upon the premises of the said bank by two officials of the government of the said republic, namely, one Wagner and one Krause.

5. The said two officials gave for the said gold (together with other gold taken at the same time) a sealed receipt of which the following is a translation:

Received eight bars of raw gold weighing 2617.23 ounces, value £8996, namely:

1.	M. K. C.	49	730.75 oz.	} African Banking Corporation £4411
2.	M.	124	395 85 "	
3.	O. T. S.		125.10 "	
4.			39.35 "	
5.			19.00 "	

6.	215	539.03 oz.	}	care of Worcester Expn. & G. M Co. £1885.	
7.		149.55 "		}	care of West Rand Central G. M. Co. £2700.
8.		617.65 "			
		<hr/>			
		2617.23 "			

From African Banking Corporation, Limited, Johannesburg.

(Sd) M. WAGNER, *Mijn Inspecteur*.

(Sd) F. E. T. KRAUSE.

Government Commission of Peace and Order upon instructions
of State Secretary

[SEAL] On behalf of the Government Commission Witwatersrand, 10
October, 1899, S. A. R. Division of Peace and Order.

(Sd) MARTIN MULDER,

(Sd) JOSEPH VAN GELDER, *Secretaries*.

6. The said gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing government of the said republic, and the said government by the laws of the said republic was under a liability to return the said gold or its value to your suppliants. None of the said gold has been returned to the suppliants, nor did the government make any payment in respect thereof.

7. A state of war between her late majesty Queen Victoria and the said republic commenced at 5 p. m., on October 11, 1899.

8. Her late majesty's forces conquered the said republic, and by a proclamation in the name of her late majesty, dated September 1, 1900, the whole of the territories of the said republic were annexed to and became part of her dominions and the late government of the said republic thereby ceased to exist.

9. By reason of the said conquest and annexation her late majesty succeeded to the sovereignty of the said government with all its rights and duties and because entitled to the whole property of the said government, and the obligation which vested in the said government in respect of the said gold is now as binding upon his majesty as though the acts and things which gave rise to such obligation had been done or suffered by her late majesty.

The suppliants, therefore, humbly pray the return of the said gold, or payment to them of the said sum of £3804.

DEMURRER: His majesty's attorney-general on behalf of our lord the king gives the court here to understand and be informed that the petition of right is bad in substance and in law, in that it does not disclose a sufficient or lawful or any obligation on his majesty towards the suppliants, or any legal or equitable right of the suppliants

against his majesty cognisable by the courts of this country or enforceable therein and on other grounds sufficient in law to sustain this demurrer.

JOINDER: The petition herein is good in substance and in law.

S. R. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*H. Sutton* with them), for the crown: The facts alleged in the petition of right disclose no obligation on the part of his majesty towards the suppliants, nor any right enforceable in this court. Where the sovereign annexes a foreign country the terms on which he does so are settled by him, and no court of law has any power to interpret or enforce those terms. *Cook v. Sprigg*, (1899) A. C. 572, is the latest of a long series of authorities which show that annexation is an act of state, and that the municipal courts have no authority to enforce obligations assumed by the conquering state under the treaty of annexation.

[They referred to *Nabob of the Carnatic v. East India Co.*, (1791) 1 Ves. Jr. 371; 2 Ves. Jr. 56. *Elphinstone v. Bedreechund*, (1830) 1 Knapp, P. C. 316; 2 St. Tr. (N. S.) 379. *Secretary of State in Council of India v. Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22; 7 Moore's Ind. Ap. Ca. 476. *Ex Rajah of Coorge v. East India Co.*, (1860) 29 Beav. 300. *Sirdar Bhagwan Singh v. Secretary of State for India*, (1874) L. R. 2 Ind. Ap. 38. *Doss v. Secretary of State for India*, (1875) L. R. 19 Eq. 509. *Rustomjee v. Reg.*, (1876) 1 Q. B. D. 487; 2 Q. B. D. 69. *The Commonwealth v. Sparhawk* (1788), 1 Dallas, 383. *United States v. Pacific Railroad*, (1886) 13 Davis, 227.]

To take an extreme case, if a conquering state confiscated all private property in the conquered state the, owners of the property could not obtain redress by means of litigation in the municipal courts of the conquering state. So, in the present case, his majesty's government having declined to recognize the suppliants' claim, this court has no power to adjudicate upon it. The claim is, in fact, absolutely without foundation. Assuming that the Transvaal government were under some contractual obligation to indemnify the suppliants, that obligation does not as a result of the annexation fall upon his majesty. There is no principle of international law by which a conquering state becomes *ipso facto* liable to discharge all the contractual obligations of the conquered state.

Lord R. Cecil, K. C., and *J. A. Hamilton, K. C.* (*Theobald Mathew* and *A. M. Talbot* with them), for the suppliants: For the purpose of this demurrer the facts must be taken to be as stated in the petition, and the case may, therefore, be argued on the basis that the gold was taken by the Transvaal government under its constitutional powers; that the seizure was not made for the purpose of hostilities, and that at the

moment of annexation the Transvaal government was under an enforceable obligation to return the gold or its value. The case for the suppliants may be put in the form of three propositions, the first of which is that by international law, where one civilized state after conquest annexes another civilized state, the conquering state, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered state, except liabilities incurred for the purpose of or in the course of the particular war. The writings of jurists on international law and stipulations in treaties are evidence of what is international law, and the proposition in question is supported by the following authorities: Hall's *International Law*, 5th ed. 99; Wheaton's *International Law*, 4th ed., 46; Halleck's *International Law* (Baker's 1878 ed.), vol. ii, 504; Calvo's *Droit International*, 4th ed. vol. i, 248; vol. iv. 404; Heffter's *Droit International de l'Europe*, 4th ed. 63, 64; Huber's *Die Staatensuccession*, s. 217. Secondly, international law is part of the law of England. This question has been much considered in cases relating to the rights and privileges of ambassadors: see *Barbuit's Case* (1737), *Cas. t. Tal.* 281; *Triquet v. Bath* (1764), 3 *Burr.* 1478; *Heathfield v. Chilton* (1767), 4 *Burr.* 2016; *Viveash v. Becker* (1814), 3 *M. and S.* 284; 15 *R. R.* 488; cases dealing with the seizure of debts: see *Dolder v. Huntingfield* (1805), 11 *Ves. Jr.* 283; 8 *R. R.* 159; *Wolff v. Oxholm* (1817), 6 *M. and S.* 92; 18 *R. R.* 313; and cases turning on the law as to territorial waters: see *Reg. v. Keyn* (1876), 2 *Ex. D.* 63. All these cases have been dealt with by the English courts on the footing that the principles of international law relating to them form part of the common law of England. Thirdly, the English courts have recognized and adopted the particular principle of international law enunciated above as the first proposition: *Calvin's Case* (1609), 4 *Coke*, 1; *Blankard v. Galdy* (1693), 2 *Salk.* 411; *Campbell v. Hall* (1774), 1 *Cowp.* 204. The sovereign has, it is admitted, power when annexing a conquered state to impose what terms and conditions he pleases as to the taking over of the obligations of the conquered state; but if nothing is said about a particular obligation then it must be deemed to have been taken over, and it can be enforced in the municipal courts of the conquering state. As soon as the annexation is complete the sovereign's absolute power to impose terms and conditions is at an end, and the rights of the inhabitants of the conquered state must be recognized and dealt with in the same way as those of the other subjects of the sovereign: *Advocate-General of Bombay v. Amerchund* (1829), 1 *Knapp P. C.* 329, n.; *Mayor of Lyons v. East India Co.* (1836), 1 *Moo. P. C.* 175; 43 *R. R.* 27; *King of the Two Sicilies v. Willcox* (1851), 1 *Sim. (N. S.)* 301; *United States of*

America v. Prioleau (1865), 2 H. & M. 559; *United States v. McRae* (1869), L. R. 8 Eq. 69; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348; *Frith v. Reg.* (1872), L. R. 7 Ex. 365. The American authorities support the contention of the suppliants. In *United States v. Percheman* (1833), 7 Peters, 51, at p. 86, Marshall, C. J. said:

It is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.

[They also referred to *Mitchel v. United States* (1836), 9 Peters, 711; *Smith v. United States* (1838), 10 Peters, 326; *Strother v. Lucas* (1838), 12 Peters, 410.]

With regard to *Cook v. Sprigg* (1899), A. C. 572, the facts there were so very different from those of the present case that it cannot be regarded as an authority. Moreover, in so far as *Cook v. Sprigg* (1899), A. C. 572 laid down the general propositions that conquest destroys all private rights, and that the repudiation of liability by a government is an act of state which the courts cannot inquire into, it is contrary to the authorities and to the principles of international law: see *Pollock on Torts*, 7th ed., 108, 109; *Law Quarterly Review*, vol. xvi, 1, 2.

The other cases relied on by the crown are also not in point. They are cases where attempts were being made to enforce rights which had been the subject of treaties or agreements between two sovereign powers, or to recover property which had been seized by the armed forces of the crown. The present case does not fall within either category. The suppliants are not seeking to set aside or interfere with the annexation, but they contend that one of the effects of the annexation has been to transfer from the Transvaal government to the crown the liability to indemnify the suppliants for the loss of their gold, and that the liability is one which can be enforced in this court.

[In addition to the cases mentioned above, they also referred to *Walker v. Baird* (1892), A. C. 491, and *Raleigh v. Goschen* (1898), 1 Ch. 73.]

Sir R. B. Finlay, A.-G., in reply: Text-writers on international law are not authoritative. The passages from their writings which have been quoted do not really support the first proposition put forward on behalf of the suppliants; they are mere general expressions of opinion, and not subject to the qualification, which the suppliants concede, that

the proposition must be limited to liabilities incurred before war and not for the purpose of war. This concession is fatal to the authority of the passages relied on. The proposition is further qualified by the admission that a conquering state may, by the terms of the annexation, stipulate that certain liabilities will not be taken over, but it is said that all liabilities not expressly excepted are taken over. It cannot be seriously contended that the absence from Lord Roberts' proclamation of a schedule of excluded debts saddles the British government with liability for all the debts of the Transvaal government, and no authority has been or can be produced to support this contention. Moreover, there are passages in Huber's *Staatusuccession*, at pp. 65, 66, 114, 115, which show that his views on this point would have been very much qualified if his mind had really been addressed to the question as it arises in this case. The proposition of the suppliants further involves an unlimited liability on the part of the conquering state—a liability "without benefit of inventory." The passages cited from Hall, Halleck and Heffter do not support this view, but on the contrary rather go to show that in the opinion of these writers the liability of the conquering state does not extend beyond the amount of the assets taken over; but the text-books are not in agreement on this point: see Westlake's *International Law*, part i, 76. The cases cited for the crown establish beyond all doubt that international law is not part of the common law of England, and that the claims of the suppliants cannot be enforced by petition of right. Decisions as to ambassadors and territorial waters are beside the question; they are *ex necessitate* cases, for neither ambassadors' privileges nor territorial waters could be said to exist if they were not recognized and enforced in courts of law.

Cur. adv. vult.

June 1. The judgment of the court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) was read by

Lord Alverstone, C.J. In this case the attorney-general, on behalf of the crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition of right alleged that two parcels of gold, amounting in all to the value of £3804, had been seized by officials of the South African Republic—£1104, on October 2 in course of transit from Johannesburg to Cape Town, and £2700 on October 9, taken from the bank premises of the petitioners. No further statement was made in the petition of the circumstances under which, or the right by which, the

government of the Transvaal republic claimed to seize the gold; but it was stated in paragraph 6,

that the gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing government of the said republic, and that the said government, by the laws of the said republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said government make any payment in respect thereof.

The petition then alleged that a state of war commenced at 5 p. m., on October 11, 1899, that the forces of the late queen conquered the republic, and that by a proclamation of September 1, 1900, the whole of the territories of the republic were annexed to, and became part of, her majesty's dominions, and that the government of the republic ceased to exist. The petition then averred that by reason of the conquest and annexation, her majesty succeeded to the sovereignty of the Transvaal republic, and became entitled to its property; and that the obligation which vested in the government was binding upon his present majesty the king.

Before dealing with the questions of law which were argued before us, we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for relief. The petition appears to us demurrable for the reason that it shows no obligation of a contractual nature on the part of the Transvaal government. For all that appears in the petition the seizure might have been an act of lawless violence. The allegations that A seized property belonging to B, and that thereupon by law an obligation arose on the part of A to return to B his property, or pay its value, might be truly made in respect of any wrongful seizure of A's property. We do not assent to the proposition of Lord Robert Cecil that it is sufficient to allege what may be a ground of action if something else be added which is not stated. Upon all sound principles of pleading, it is necessary to allege what must, and not what may, be a cause of action, and unless the obligation alleged in the present instance arose out of contract, it is clear that no petition of right could be maintained. A passage in the judgment of Willes J. in the case of *Gautret v. Egerton* (1867), L. R. 2 C. p. 371, states this view so clearly that we think it well to quote it. Willes J. says:

The argument urged on behalf of the plaintiffs, when analysed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*. What is it that a declaration of this sort should state in order to

fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged.

I need scarcely add that in dealing with a petition of right, which must be based upon contract, that observation would of course have its full force and effect. The discussion, however, is academical, as the attorney-general for the crown, as well as Lord Robert Cecil for the suppliants desired that we should deal with the case as if any necessary amendment had been made, and decide the question whether all the contractual obligations of a state annexed by Great Britain upon conquest are imposed as a matter of course, and in default of express reservations upon Great Britain, and can be enforced by British municipal law against the crown in the only way known to British municipal law, that is by a petition of right. We have no hesitation in answering this question in the negative, but, inasmuch as it is one of great importance, and we have had the advantage of hearing very able argument upon both sides, we think it right to give our reasons in some detail.

Lord Robert Cecil argued that all contractual obligations incurred by a conquered state, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be made upon grounds which, without depriving the original liability of its character of a legal obligation against the vanquished state, make it inexpedient for the conquering state to adopt that liability as against itself; in other words, upon ethical grounds, into which enter considerations of propriety, magnanimity, wisdom, public duty, in short, of policy, in the broadest and widest sense of the word. It is equally clear that these are matters with which municipal courts have nothing to do. They exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them, although legally binding, ought not to be enforced. The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by states before conquest such as no conqueror would ever think of carrying out. Some illustrations will occur in the course of our subsequent remarks. For the moment we will pursue Lord Robert's argument into further detail. His main proposition was divided into three heads. First, that, by international law, the sovereign of a conquering state is liable for the obligations of the conquered; secondly, that international law forms

part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered state, must be protected and can be enforced by the municipal courts of the conquering state.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase "international law"), rests upon a consensus of civilized states, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shown to exist. Perhaps it is in regard to the extra-territorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfill the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to

what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should *in foro conscientiae* be assumed. There must also be many contractual liabilities of the conquered state of the very existence of which the superior power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the government of the conquered state. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general state expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he

thinks fit in respect of the obligations of the conquered territory, and that he alone must be the judge in such a matter, is clearly recognized by Grotius: see *War and Peace*, Book III, chap. 8, s. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii, p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered state. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that, in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform taken by such treaties. See as to this, s. 27 of the 4th edition of Hall's *International Law*, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book, 4th ed., 105, in which he stated that the annexing power is liable for the whole of the debts of the state annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would call attention particularly to s. 27, on pp. 98 and 99, of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passage on pp. 101 and 102, referring to the discussion between England and the United States in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain is approved of by Mr. Hall. In the same way the passage from Halleck, s. 25 of chap. 44 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfill all contracts passed to the conquering state. The particular section is in fact directed to the obligations of the conquering or annexing state upon the rights of private property of the individual—the point which

formed the subject of discussion in the American cases upon which the suppliants relied and with which we shall deal later on. The passage from Wheaton (Atlay's ed., 46, s. 30) shows that the writer was only expressing an opinion respecting the duty of a succeeding state with regard to public debts, and, as the note to the passage shows, it is really based upon the fact that many treaties have dealt with such obligations in different ways. We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering state. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered state on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on *State Succession*, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on *International Law*, published last year, and from other criticisms, that Huber does not attempt to press the duty of a succeeding or conquering state to recognize the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the attorney-general in his reply and other passages in Huber's book show that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers, they are, in our judgment, inconsistent with the law as recognized for many years in the English courts; and it is sufficient for us to cite the language of Lord Mansfield in *Campbell v. Hall*, 1 Cowp. 204, at p. 209, in a passage the authority of which has, so far as we know, never been called in question:

It is left by the constitution to the king's authority to grant or refuse a capitulation. * * * If he receives the inhabitants under his protection and grants them their property he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

And so, much earlier, in the year 1722 (2d Peere Williams, 75), it is

said by the master of the rolls to have been determined by the lords of the privy council that

where the king of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases

References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the state accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail.

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration:

What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.

In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if

the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case*, Cas. t. Tal. 281; *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff v. Oxholm*, 6 M. and S. 92; 18 R. R. 313, and *Rex v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering state is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering state can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering state would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal courts could those courts decide as to the obligations which ought or ought not to be discharged by the conquering state. To refer again to the instance given in the commencement of this judgment the obligation incurred by the conquered state by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering state to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from

the year 1793 down to the present time, holding that matters which fall properly to be determined by the crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts. It is quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic v. East India Co.*, 1 Ves. Jr. 371; 2 Ves. Jr. 56, down to *Cook v. Sprigg* (1899), A.C. 572. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words:

The taking possession by her majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state and treating Sigcau as an independent sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.

We do not repeat the citations of *Secretary of State for India v. Kama- chee*, 13 Moo.P.C. 22, and *Doss v. Secretary of State for India*, L.R.19 Eq. 509, referred to in the judgment in *Cook v. Sprigg* (1899), A. C. 572. They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook v. Sprigg* (1899), A.C. 572. The case of *Rustomjee v. Reg.*, 1 Q. B.D. 487; 2 Q.B.D. 69, affirmed in the court of appeal, deserves, however, one word of comment. There the British government had received from the Chinese government a sum of money in respect of certain claims made upon that government by persons, of whom the petitioner was one. A petition of right was brought in order to enforce payment by our government of those claims out of the sum so received by the British government. From some points of view that case may be considered much stronger in favor of the suppliant than the present, the money having been received by the crown under a treaty specifically on account of the debts due to British subjects. In delivering the judgment of the court of

appeal, Lord Coleridge used language which has a strong bearing on the present case. He said (2 Q. B. D., at p. 73):

The queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts.

It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own court of chancery, to which we think it right to refer. A careful examination of these cases satisfies us that rightly understood no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States v. Percheman*, 7 Peters 51; *Mitchell v. United States*, 9 Peters, 711; *Smith v. United States*, 10 Peters, 326, and *Strother v. Lucas*, 12 Peters, 410. These cases arose respecting the rights of landed property in Florida, Louisiana and Missouri. They were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of Marshall C. J., 7 Peters, at p. 86, and of Baldwin J., 9 Peters, at p. 733; 10 Peters, at p. 329, all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered state and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering states with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise

in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered state towards individuals is to be undertaken by the conquering state. The English cases on which reliance was placed were *United States v. Prioleau*, 2 H. & M. 559, in which a claim was made by the United States government to cotton which had been the property of the confederated states; *United States v. Macrae*, L. R. 8 Eq. 69, which recognized the right of the government suppressing rebellion to all moneys, goods and treasures which were public property at the time of the outbreak; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489, and *Republic of Peru v. Dreyfus*, 38 Ch. D. 348. The only principle, however, which can be deduced from these cases is that a government claiming rights of property and rights under a contract cannot enforce those rights in our courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are aware that we have not commented upon all the cases which were cited before us—we have not failed to consider them; and any arguments which could be founded upon them seem to us to be covered by the observations already made. We are of opinion, for the reason given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against his majesty in this or in any municipal court; and we therefore allow the demurrer, with costs.

Judgment for the crown.

For a discussion of this case, both as to the correctness or incorrectness of the conclusion and the relation of international to municipal law, see an article by Professor Westlake, *Is International Law a Part of the Law of England* (22 *Law Quarterly Rev.*, 14-16).

Attention is called to the judgment of Chief Justice Marshall in *U. S. v. Percheman* (1833), 7 Peters 51, which was cited in the principal case but which was not given full force and effect.—J. B. S.

DECISION BY THE SWISS FEDERAL COURT CONCERNING THE INTERNATIONAL AND CONSTITUTIONAL EFFECTS OF TERRITORIAL POSSESSION AND THE DUTY OF A SUCCEEDING STATE TO RECOGNIZE THE CONCESSIONS GRANTED BY ITS PREDECESSOR

*Historical Introduction*¹

The legal foundation for this decision is as follows: The portion of the Rhine which separates the territory of the cantons of Zurich and Schaffhausen, was ever since the middle ages the cause of disputes between these two countries. A decision by a court of arbitration of 1555 pronounced their reciprocal duty to leave the river in its *statu quo* and fixed the boundary, but in a manner which later gave rise to a suit, decided by the Federal Court in 1897, in which the people of Schaffhausen claimed the whole width of the river as theirs, as they did three centuries ago, while the people of Zurich contended that the middle of the Rhine constituted the cantonal boundary. It appeared from the legal documents submitted to the Federal Court, that even in the seventeenth and eighteenth centuries there seems to have prevailed uncertainty as to the jurisdiction over the Rhine, that both cantons exercised acts of sovereignty with respect to the river, and that particularly during the larger part of the nineteenth century, Zurich exercised actual jurisdiction over the southern half of the river, which in fact was in no wise disputed by Schaffhausen. An agreement of 1824, regulating the riparian rights which establishes the *statu quo* with respect to the river bed, like the decision of 1555 seems to rest equally upon the supposition that both states had equal rights in the river. During this period each canton granted concessions in accordance with its laws for works erected on its side of the river, reserving to the neighboring state, it is true, the right of protest existing under the agreement regulating the riparian rights. In the case of works which extended over both cantons, a mutual understanding was generally reached between the two governments. One of the works, obtaining a concession from Zurich on its side of the river, was the pottery establishment of Ziegler Bros., whose water rights were extended repeatedly.

When efforts were being made in the canton of Zurich to erect large power works at the Rhine-falls toward the end of eighties, Schaffhausen assumed a different attitude; it not only disputed Zurich's right to

¹ Compare: Max Huber, Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen, in the first volume of Zeitschrift für Völkerrecht und Bundesstaatsrecht (1906), pp. 29-52, 159-217.

authorize alone any works at the Rhine-falls, but reasserted in a suit before the Federal Court its old claim to the whole Rhine, which had practically been forgotten; in the meanwhile. The Federal Court, which, as a court of first and last resort, adjudges all intercantonal disputes, decided that, though Schaffhausen was not the owner of the entire width of the river for the whole distance of the Rhine, it was such owner as to a part, notwithstanding the fact that Zurich had exercised jurisdiction over the southern half of the Rhine for about seventy years, going back to the decision of 1555 and regarding Schaffhausen's ownership, which it deemed recognized therein, as incapable of being lost through any change in actual possession. Zurich accordingly has no right to exercise acts of sovereignty with respect to the half of the river adjoining its territory, for example, to grant other concessions, or to assert claims based upon existing rights, granted it, *e. g.*, to the payment of water taxes. It has guaranteed this also to Schaffhausen through an agreement of the year 1900. Zurich can today acquire rights with respect to the portion of the Rhine in question, as against Schaffhausen only by virtue of the agreements concerning the regulation of riparian rights of 1824 and 1900 and under the general rules governing interstate rights of vicinage.

As a result of the rejection of Zurich's claim to the ownership of the southern half of the river, the status of the owners of water works on the Zurich side was changed inasmuch as the water works were now in Schaffhausen territory while the possessor of the water sovereignty was no longer the grantor of the concession, Zurich, but the new sovereign, Schaffhausen. Schaffhausen which, during the progress of the dispute with Zurich, assumed a harsher and harsher attitude with respect to the Zurich water interests in the Rhine, took the position that the concessions granted by Zurich were without legal foundation, not having been made by a competent sovereign, and need not be recognized by Schaffhausen. The owner of the most important concession on the Zurich side, the pottery manufacturing establishment of Ziegler Bros., in order to protect its rights, brought two suits against the canton of Schaffhausen in the Federal Court; it prayed (1) that Schaffhausen should grant it a concession in perpetuity for the quantity of water which it was entitled to, partly as a result of the concession made by Zurich, partly by reason of a contract with the water works company of Schaffhausen which has become since the property of the municipality of Schaffhausen. The city of Schaffhausen intervened in the suit as the legal successor of the water works company. A second alternative prayer was to the effect that Schaffhausen should at

least recognize the concessions from Zurich, *i. e.*, that a so-called private right of property created through an administrative act should be recognized by the territorial successor. While plaintiff's first prayer, which does not interest us, was denied, the second one was granted.

Argument and disposition contained in the decision of the Swiss Federal court in re: pottery works of Ziegler Bros., canton of Schaffhausen, concerning water rights, October 5, 1905

1. With respect to prayer 1 of the suit, in which plaintiff claims that defendant should grant it a water concession of a definite description, and which was not finally determined by the purely procedural disposition made by the examining magistrate, June 10, 1905, the Federal Court is without jurisdiction. For the granting of water right concessions by a state is an act of sovereignty, and is governed by rules of public law, so that the refusal to grant such concession can constitute really only a violation of a public duty on the part of the competent authority, but not of applicant's private right. The prayer in question, therefore, cannot be submitted to the Federal Court as a court of civil jurisdiction by virtue of Art. 48, No. 4, O. G.² But it falls just as little within the scope of the jurisdiction of the Federal Court over suits in which a canton is a party to which plaintiff has appealed in its reply, since the Federal Court in such capacity has no jurisdiction to hear suits directly between private persons and cantons, resp. cantonal authorities, as a court of first and last resort, but only under certain circumstances as a court of appeal, in accordance with Art. 175, No. 3, and 178 O. G.³ On the other hand, prayer 2 of the complaint, which as an alternative prayer will take the place of prayer 1 even in the event here given that the latter is formally unfounded, conforms, to the requisites of Art. 48, No. 4, O. G., which was relied upon. Plaintiff demands in this prayer in fact, the recognition of the right, described in prayer 1, to use the water power of the Rhine for its works and its protection in accordance with defendant's legislation. It claims, therefore, referring expressly to the provision of the private law of Schaffhausen in question, a private right of usufruct in the flowing Rhine, which undoubtedly exceeds by far 3000

² According to Art. 110 of the Federal Constitution suits may be brought in the Federal Court in matters of private law between cantons on the one side and private persons or corporations on the other side.

³ An appeal might in a given case take place also on account of the violation of a right guaranteed by the Federal Constitution, *e. g.*, that of freedom of trade or of equality (arbitrary treatment) or of a right guaranteed by the constitution of Schaffhausen.

said by the master of the rolls to have been determined by the lords of the privy council that

where the king of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases.

References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the state accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail.

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration:

What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.

In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if

the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case*, Cas. t. Tal. 281; *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff v. Oxholm*, 6 M. and S. 92; 18 R. R. 313, and *Rex v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering state is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering state can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering state would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal courts could those courts decide as to the obligations which ought or ought not to be discharged by the conquering state. To refer again to the instance given in the commencement of this judgment the obligation incurred by the conquered state by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering state to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from

the year 1793 down to the present time, holding that matters which fall properly to be determined by the crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts. It is quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic v. East India Co.*, 1 Ves. Jr. 371; 2 Ves. Jr. 56, down to *Cook v. Sprigg* (1899), A.C. 572. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words:

The taking possession by her majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state and treating Sigcau as an independent sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.

We do not repeat the citations of *Secretary of State for India v. Kama-chee*, 13 Moo.P.C. 22, and *Doss v. Secretary of State for India*, L.R.19 Eq. 509, referred to in the judgment in *Cook v. Sprigg* (1899), A. C. 572. They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook v. Sprigg* (1899), A.C. 572. The case of *Rustomjee v. Reg.*, 1 Q. B.D. 487; 2 Q.B.D. 69, affirmed in the court of appeal, deserves, however, one word of comment. There the British government had received from the Chinese government a sum of money in respect of certain claims made upon that government by persons, of whom the petitioner was one. A petition of right was brought in order to enforce payment by our government of those claims out of the sum so received by the British government. From some points of view that case may be considered much stronger in favor of the suppliant than the present, the money having been received by the crown under a treaty specifically on account of the debts due to British subjects. In delivering the judgment of the court of

appeal, Lord Coleridge used language which has a strong bearing on the present case. He said (2 Q. B. D., at p. 73):

The queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts.

It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own court of chancery, to which we think it right to refer. A careful examination of these cases satisfies us that rightly understood no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States v. Percheman*, 7 Peters 51; *Mitchell v. United States*, 9 Peters, 711; *Smith v. United States*, 10 Peters, 326, and *Strother v. Lucas*, 12 Peters, 410. These cases arose respecting the rights of landed property in Florida, Louisiana and Missouri. They were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of *Marshall C. J.*, 7 Peters, at p. 86, and of *Baldwin J.*, 9 Peters, at p. 733; 10 Peters, at p. 329, all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered state and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering states with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise

in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered state towards individuals is to be undertaken by the conquering state. The English cases on which reliance was placed were *United States v. Prioleau*, 2 H. & M. 559, in which a claim was made by the United States government to cotton which had been the property of the confederated states; *United States v. Macrae*, L. R. 8 Eq. 69, which recognized the right of the government suppressing rebellion to all moneys, goods and treasures which were public property at the time of the outbreak; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489, and *Republic of Peru v. Dreyfus*, 38 Ch. D. 348. The only principle, however, which can be deduced from these cases is that a government claiming rights of property and rights under a contract cannot enforce those rights in our courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are aware that we have not commented upon all the cases which were cited before us—we have not failed to consider them; and any arguments which could be founded upon them seem to us to be covered by the observations already made. We are of opinion, for the reason given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against his majesty in this or in any municipal court; and we therefore allow the demurrer, with costs.

Judgment for the crown.

For a discussion of this case, both as to the correctness or incorrectness of the conclusion and the relation of international to municipal law, see an article by Professor Westlake, *Is International Law a Part of the Law of England* (22 Law Quarterly Rev., 14-16).

Attention is called to the judgment of Chief Justice Marshall in *U. S. v. Percheman* (1833), 7 Peters 51, which was cited in the principal case but which was not given full force and effect.—J. B. S.

DECISION BY THE SWISS FEDERAL COURT CONCERNING THE INTERNATIONAL AND CONSTITUTIONAL EFFECTS OF TERRITORIAL POSSESSION AND THE DUTY OF A SUCCEEDING STATE TO RECOGNIZE THE CONCESSIONS GRANTED BY ITS PREDECESSOR

*Historical Introduction*¹

The legal foundation for this decision is as follows: The portion of the Rhine which separates the territory of the cantons of Zurich and Schaffhausen, was ever since the middle ages the cause of disputes between these two countries. A decision by a court of arbitration of 1555 pronounced their reciprocal duty to leave the river in its *statu quo* and fixed the boundary, but in a manner which later gave rise to a suit, decided by the Federal Court in 1897, in which the people of Schaffhausen claimed the whole width of the river as theirs, as they did three centuries ago, while the people of Zurich contended that the middle of the Rhine constituted the cantonal boundary. It appeared from the legal documents submitted to the Federal Court, that even in the seventeenth and eighteenth centuries there seems to have prevailed uncertainty as to the jurisdiction over the Rhine, that both cantons exercised acts of sovereignty with respect to the river, and that particularly during the larger part of the nineteenth century, Zurich exercised actual jurisdiction over the southern half of the river, which in fact was in no wise disputed by Schaffhausen. An agreement of 1824, regulating the riparian rights which establishes the *statu quo* with respect to the river bed, like the decision of 1555 seems to rest equally upon the supposition that both states had equal rights in the river. During this period each canton granted concessions in accordance with its laws for works erected on its side of the river, reserving to the neighboring state, it is true, the right of protest existing under the agreement regulating the riparian rights. In the case of works which extended over both cantons, a mutual understanding was generally reached between the two governments. One of the works, obtaining a concession from Zurich on its side of the river, was the pottery establishment of Ziegler Bros., whose water rights were extended repeatedly.

When efforts were being made in the canton of Zurich to erect large power works at the Rhine-falls toward the end of eighties, Schaffhausen assumed a different attitude; it not only disputed Zurich's right to

¹ Compare: Max Huber, Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen, in the first volume of *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1906), pp. 29-52, 159-217.

authorize alone any works at the Rhine-falls, but reasserted in a suit before the Federal Court its old claim to the whole Rhine, which had practically been forgotten; in the meanwhile. The Federal Court, which, as a court of first and last resort, adjudges all intercantonal disputes, decided that, though Schaffhausen was not the owner of the entire width of the river for the whole distance of the Rhine, it was such owner as to a part, notwithstanding the fact that Zurich had exercised jurisdiction over the southern half of the Rhine for about seventy years, going back to the decision of 1555 and regarding Schaffhausen's ownership, which it deemed recognized therein, as incapable of being lost through any change in actual possession. Zurich accordingly has no right to exercise acts of sovereignty with respect to the half of the river adjoining its territory, for example, to grant other concessions, or to assert claims based upon existing rights, granted it, *e. g.*, to the payment of water taxes. It has guaranteed this also to Schaffhausen through an agreement of the year 1900. Zurich can today acquire rights with respect to the portion of the Rhine in question, as against Schaffhausen only by virtue of the agreements concerning the regulation of riparian rights of 1824 and 1900 and under the general rules governing interstate rights of vicinage.

As a result of the rejection of Zurich's claim to the ownership of the southern half of the river, the status of the owners of water works on the Zurich side was changed inasmuch as the water works were now in Schaffhausen territory while the possessor of the water sovereignty was no longer the grantor of the concession, Zurich, but the new sovereign, Schaffhausen. Schaffhausen which, during the progress of the dispute with Zurich, assumed a harsher and harsher attitude with respect to the Zurich water interests in the Rhine, took the position that the concessions granted by Zurich were without legal foundation, not having been made by a competent sovereign, and need not be recognized by Schaffhausen. The owner of the most important concession on the Zurich side, the pottery manufacturing establishment of Ziegler Bros., in order to protect its rights, brought two suits against the canton of Schaffhausen in the Federal Court; it prayed (1) that Schaffhausen should grant it a concession in perpetuity for the quantity of water which it was entitled to, partly as a result of the concession made by Zurich, partly by reason of a contract with the water works company of Schaffhausen which has become since the property of the municipality of Schaffhausen. The city of Schaffhausen intervened in the suit as the legal successor of the water works company. A second alternative prayer was to the effect that Schaffhausen should at

least recognize the concessions from Zurich, *i. e.*, that a so-called private right of property created through an administrative act should be recognized by the territorial successor. While plaintiff's first prayer, which does not interest us, was denied, the second one was granted.

Argument and disposition contained in the decision of the Swiss Federal court in re: pottery works of Ziegler Bros., canton of Schaffhausen, concerning water rights, October 5, 1905

1. With respect to prayer 1 of the suit, in which plaintiff claims that defendant should grant it a water concession of a definite description, and which was not finally determined by the purely procedural disposition made by the examining magistrate, June 10, 1905, the Federal Court is without jurisdiction. For the granting of water right concessions by a state is an act of sovereignty, and is governed by rules of public law, so that the refusal to grant such concession can constitute really only a violation of a public duty on the part of the competent authority, but not of applicant's private right. The prayer in question, therefore, cannot be submitted to the Federal Court as a court of civil jurisdiction by virtue of Art. 48, No. 4, O. G.² But it falls just as little within the scope of the jurisdiction of the Federal Court over suits in which a canton is a party to which plaintiff has appealed in its reply, since the Federal Court in such capacity has no jurisdiction to hear suits directly between private persons and cantons, resp. cantonal authorities, as a court of first and last resort, but only under certain circumstances as a court of appeal, in accordance with Art. 175, No. 3, and 178 O. G.³ On the other hand, prayer 2 of the complaint, which as an alternative prayer will take the place of prayer 1 even in the event here given that the latter is formally unfounded, conforms, to the requisites of Art. 48, No. 4, O. G., which was relied upon. Plaintiff demands in this prayer in fact, the recognition of the right, described in prayer 1, to use the water power of the Rhine for its works and its protection in accordance with defendant's legislation. It claims, therefore, referring expressly to the provision of the private law of Schaffhausen in question, a private right of usufruct in the flowing Rhine, which undoubtedly exceeds by far 3000

² According to Art. 110 of the Federal Constitution suits may be brought in the Federal Court in matters of private law between cantons on the one side and private persons or corporations on the other side.

³ An appeal might in a given case take place also on account of the violation of a right guaranteed by the Federal Constitution, *e. g.*, that of freedom of trade or of equality (arbitrary treatment) or of a right guaranteed by the constitution of Schaffhausen.

fr., the minimum amount required for the jurisdiction of the Federal Court, and according to a correct interpretation of the petition, though it is framed exclusively with reference to the protection of possessory rights, it primarily involves the establishment of the right in question—its legal existence, nature and extent. Plaintiff is entitled to bring such action since defendant's administrative council, according to the negotiations concerning the concessions carried on with plaintiff, has not recognized the right and has threatened to hinder or to disturb plaintiff in the exercise of its alleged right through a notification that it will eventually prohibit the actual use of the water or to allow the continuance of its use only in its discretion. The complaint, moreover, would lie also from the point of view of the right to possessory protection: for the threat by the administrative council in its discretion to put an end to existing conditions may very well be regarded, contrary to the argument of the intervener, as an existing disturbance of plaintiff's right of possession. The objection that plaintiff's alleged right had never existed or existed no longer, can, of course, not defeat, as the intervener seems to assume, the jurisdiction of the Federal Court, since the determination of this point is the very object of the litigation and by virtue of Art. 48, No. 4, O. G., in accordance with a general rule of procedure, the mere assertion of such right suffices for such determination.

2. As to the question then, whether plaintiff's claim contained in prayer 2 of its complaint, which defendant disputes *in toto* and eventually as to its extent, is well founded, the burden is on the plaintiff to prove the alleged right, *i. e.*, to show a mode of acquisition binding on the defendant. For this purpose plaintiff, according to the statements of the complaint, relies in the first place upon the fact that defendant by reason of its tacit consent or even by reason of an active participation on the part of its authorities in the granting of the concession by the canton of Zurich to plaintiff, had recognized its right resulting from such concession, a fact which defendant was in duty bound formally to ratify by the granting of a corresponding concession of its own, in the sense of prayer 1 of the complaint. This argument, however, is clearly wrong. The active participation in question by the authorities of Schaffhausen was limited, as defendant, relying upon plaintiff's own statement of the case has well shown in the answer, to the granting of a river-police permit for the changes in the banks and course of the river necessarily caused by plaintiff's projected works based upon its agreement of May 25, 1824, with the canton of Zurich concerning the banks of the Rhine. These permits, therefore, had no reference to plaintiff's water rights as such: they could of necessity not relate to them since at that time, it is

conceded, jurisdiction over the left half of the Rhine was regarded as belonging to the canton of Zurich and defendant, therefore, could at all events take no direct part in acts of sovereignty over this region, such as the granting of plaintiff's water right and at most indirectly as sovereign over the right half of the river, in the event the latter was affected also, which was not the case here. For the same reason the omission on the part of the authorities of Schaffhausen to file a protest against the water right concessions by Zurich cannot be regarded as a binding recognition nor as a personal grant of plaintiff's water rights by defendant. For inasmuch as at that time the authorities of Schaffhausen were not at all aware of the actual legal status of the defendant, which was defined only in the subsequent suit, its conduct cannot be judged legally upon the basis of the actual legal situation, and for that very reason, as the intervener has maintained correctly, there can be no question in particular as to tacit delegation of the right to grant concessions to the authorities of Zurich. In the second place plaintiff assumes the position that according to the former legislation of Schaffhausen which was in force at the time of the erection of the water works, a concession was not required for the creation of a private right of usufruct in public waters, and that its water right in question, therefore, in the absence of error as to jurisdiction over the Rhine, had been acquired by plaintiff through the erection of the water works. But even in this manner, plaintiff's title cannot be sustained. It can be derived naturally only from actual and really existing circumstances and not from an assumed state of affairs. As, admittedly, the portion of the Rhine used by plaintiff during the period in question was actually under the jurisdiction of Zurich, the question as to the acquisition at that time of private rights in that portion of the river will be governed by the then existing law of Zurich. The fact that the extension of its jurisdiction over that portion of the river by Zurich was adjudged later in the suit between Schaffhausen and Zurich to have rested upon an error of law and that the defendant was declared legal sovereign over the territory in question, cannot have as consequence that the legal acts which occurred under the sovereignty of Zurich and of its law are to be judged subsequently from the standpoint of the law of Schaffhausen, existing at that time but never actually applied to them. This fact, on the contrary, could logically at most lead to the result that plaintiff's right resting upon the concessions from Zurich should be deemed null and void by reason of the incompetency on the part of the canton of Zurich to grant concessions, as was subsequently determined, or, if it were nevertheless to be regarded as having been validly created, it should be deemed modified by reason of the

change in sovereignty at least with respect to its nature, in conformity to the law of Schaffhausen existing at that time.

3. According to the above, the first inquiry is whether, under the law of Zurich, plaintiff could have acquired at all a private right of the alleged sort under the concession made by Zurich. The law of Zurich expressed in its code of private law (sec. 485, 486 and 657) which was enacted in the eighteen hundred and fifties; *i. e.*, in the period of its undoubted application to that portion of the river used by plaintiff—represents the standpoint that rivers as the Rhine, being public things and “meant for common use,” are indeed not subject to private ownership, but that nevertheless particular private rights of usufruct, so-called water rights, may be acquired therein, and the acquisition of such right, particularly that of exploiting water power by means of the erection of water-power works—which constitutes the principal form of such rights—is conditioned upon a governmental permit (sec. 659 of the P. G. B.) the granting of which has at all times fallen within the province of the administrative council (compare in the chronological order of their enactment: Sec. 8, No. 6 of the law concerning industries in general and that concerning artisans in particular of May 9, 1832 (Off. G. S. vol. 2, pp 22 fg.), in which such a resolution by the council and bearing date March 5, 1806, was confirmed—also, sec. of the law concerning the granting of water rights and the fixing of water taxes, of March 21, 1836 (Off. G. S., vol. 4, pp. 211 fg.)—also sec. 2 of the law concerning the use of public waters and water works, of April 14, 1872 (Off. G. S., vol. 16. 535 fg.) and finally sec. 22 of the law concerning the correction, maintenance and use of public waters (water-works law), of December 15, 1901 (Off. G. S., vol. 26, pp. 325 fg.) That a water right obtained in this manner represents a private real right of usufruct on the part of its owner can hardly admit of doubt—in view of the place assigned to sec. 486 P. G. B. in the code and its wording (“private rights, *e. g.*, water rights, may be created and acquired, however, with respect to the individual parts of public things”) as well as in view of the provision in sec. 33 of the water-works law of 1901, to the effect that water rights granted in perpetuity and without any reservation can be withdrawn only upon a mutual understanding between the parties or under the power of expropriation. It is not necessary to determine whether a constitutive effect is to be ascribed to the grant of a governmental license, or whether it is to be regarded merely as a permission to acquire such rights of usufruct by means of the erection of the authorized works. For under either assumption plaintiff or its legal predecessors have acquired under the concessions made to them by

the administrative council of the canton of Zurich, a real private right for the exploitation of the water power of the Rhine, determinable by such concessions and the water works erected accordingly. This right, moreover, must be regarded as having been granted in perpetuity, since by reason of its real nature a limitation as to time is not essential—and as the concessions do not contain such limitations—a fact which the canton of Zurich has implicitly recognized in its grant of a new part-concession to plaintiff, of May 2, 1902, in which it did not limit the concession, notwithstanding the fact that its new legislation authorizes new concessions with a limited duration only. Moreover, such origin of plaintiff's rights as such, is not contested seriously by the two opposing parties; the dispute in the main is rather as to whether the defendant is bound to recognize such right, in other words, whether such right is still existing—the intervener before mentioned contending that the concessions by Zurich have lapsed, which contention was brought forward also by defendant's representative today.

4. If it must further be examined, therefore, whether one of the possible legal consequences above mentioned (No. 2, in fine) can be attributed to the error which was subsequently discovered and adjudged with respect to the sovereignty, the following must be taken into consideration: Sovereignty in its relation to individuals who are subject to it from a territorial or national standpoint, is essentially a *de facto* relationship; he who exercises sovereignty according to international law is sovereign over the territory and over the persons belonging thereto, irrespective of the fact whether the actual condition corresponds also to the international status of the territory or not, or in other words, whether the sovereignty in question exists lawfully with respect to other states. Even in the case of a sovereignty which from the standpoint of international law does not exist and is lacking so-called legitimacy, even when all other states or some of them should expressly refuse to recognize it—think of a government which has been usurped but is being carried on in an orderly way—and all the more so if such sovereignty is generally recognized as legitimate, though under a mistake, the internal acts of such a sovereignty have the same effect as those of a government existing lawfully according to international law, *i. e.*, the subjects can avail themselves of the institutions of the government actually controlling them whether such governments exist in conformity with international law or be inconsistent therewith. According to this theory, which prevails among the modern writers on constitutional law and is based upon the necessary continuity of law, the fact that in a given territory an actual but legally incompetent government, is replaced

by the rightful government, will have the same legal significance as has in general the passing of a territory from one government to another. (Compare on this point the authoritative treatise Zachariae: Ueber die Verpflichtung restaurierter Regierungen aus den Handlungen einer Zwischenherrschaft, in the Zeitschrift für die gesamte Staatswissenschaft, 1853, pp. 79 fg., and of the newer literature: Fiore, Trattato di diritto internazionale pubblico, vol. i, no. 324, p. 216, par. 2, and Jellinek, Recht des modernen Staates, vol. i, p. 210, and also the decisions of the Franco-Chilean court of arbitration with respect to the claims of the creditors of the state of Peru with respect to its deposits of guano, of July 1901, pp. 291-292, which represent the above theory and contain references to their literature.) In the present case, in particular, the transfer of the left half of the Rhine, embracing mainly plaintiff's water right, from the canton of Zurich to the canton of Schaffhausen, by virtue of the decision by the Federal Court of November 9, 1897, which pronounced Zurich's sovereignty up to that time actually exercised upon that territory to be illegal and which in a declaratory sense attributed the territory in question to the jurisdiction of defendant, is to be looked upon as if the transfer has been effected by virtue of some constitutive act particularly by virtue of a voluntary cession (as was actually the case in the compact regulating the riparian rights of the canton in question of the year 1900 with respect to a larger cession of territory than that called for by the decision of the Federal Court), *i. e.*, as a transfer from the legal sovereignty of Zurich to that of Schaffhausen. Consequently, the transfer is governed by the ordinary principles applicable to the international succession of states, which plaintiff has advanced in its reply simultaneously with the already refuted line of argument contained in the complaint, and which, moreover, would have to be applied by the judge *ipso facto* to the case. According to these principles the law of the state assuming sovereignty simply takes the place of that of its predecessor with respect to the territory affected by such change of sovereignty, and in such a way that the public law of the former is applicable immediately to all relations, while existing private rights, on the other hand, so far as they are not inconsistent with the new public law, are not affected by the new private law in their nature and substance but are subject only to its rules concerning the alteration and loss of private rights (comp. Zachariae, particularly p. 95 and of more recent date particularly Max Huber, Staatszucksession, sec. 3 (No. 23 fg.) pp. 18 fg., No. 93 pp. 59-60, and No. 218 pp. 149-150). The objections raised particularly by the defendant against this view of the law cannot prevail. If the defendant wishes to adduce the theory with

respect to mistake in the formation of an ordinary contract in order to establish the invalidity of the concession made to plaintiff by Zurich under a mistaken supposition, it will fail, leaving out of question the correctness of the analogy, for the reason that according to such theory, defendant at all events, as an outside party, and it so designates itself, is incompetent to avail itself of the error in question between plaintiff and the canton of Zurich, since such error would cause by no means the absolute nullity of the transaction. The rules of the civil law: *nemo plus juris ad alium transferre potest quam ipse habet*, and *resoluto iure concedentis resolvitur jus concessum*, leaving out of question again the above expressed doubt are clearly not applicable to the granting of a concession, a transaction falling within the domain of public law, for the reason that both have in view the derivation of the transferee's right from an equivalent right possessed by the transferer, *i. e.*, the transfer of an existing right, while plaintiff's alleged right in this case was created only in one way or another through the concession, and consequently was not transferred as such from a state to an individual. It would follow from such arguments that as a result of the judgment of the Federal Court, plaintiff's water works would have to be regarded as being without the pale of law and thus exposed to the arbitrary action on the part of the authorities of Schaffhausen, a situation which assuredly would not be consistent at all with the legal need of modern states and the community of nations.

5. The view entertained particularly by the intervener, that the private right conferred upon plaintiff by the concession from Zurich had lapsed, because the canton of Zurich had assumed the obligation toward the defendant to cancel such concessions in the public books, is without any foundation at all. For this matter of cancellation, which, moreover, according to plaintiff's statements has not as yet taken place, involves without question a purely formal act, by means of which the local registration of plaintiff's water rights is to be brought into harmony with the legal situation, which is now defined, but their substance is not to be affected or disturbed. The only question now is whether such right can continue to exist under the law of Schaffhausen in accordance with the above considerations. No express rule of the public law of Schaffhausen which would be opposed to the existence of such a private right has been proved. The provision of sec. 701 P. G. B., in particular, essentially a provision of public law, according to which no real property can be charged with a perpetual easement, cannot be invoked since the question in this case does not involve the burdening of a piece of real estate belonging to an individual, but the restriction of the com-

mon use of a public thing by means of a private real right of usufruct. On the other hand the law of Schaffhausen without question recognizes private rights of usufruct in perpetuity in public waters—which are governed legally by rules patterned after the legislation of Zurich (comp. sec. 605 fg., P. G. B. of Schaffhausen) for the defendant itself admits such to be the nature of those water rights dating from olden times and generally springing from feudal tenures, which are entered in the ground book as parts of the adjoining property. As long as such rights exist, they may rest upon one title or another, there can be no question at least as to the illegality of such legal institutions by reasons of the public law of Schaffhausen. Moreover, private water rights in perpetuity based upon actual concessions are not unknown in the legislation of the canton sued; for example the right granted to the water works company of Schaffhausen by the joint grant from Zurich and Schaffhausen for the older (upper) works was originally not limited in time and was limited in duration only at the time of the subsequent consolidation of the concessions for the older works with those for the newer (lower) works, erected in the eighteen hundred and eighties—a change which, as plaintiff has correctly mentioned in the reply could be effected only with the coöperation, *i e.*, the consent of the new owner of the works, of the present intervener. The legislation of Schaffhausen, with respect to water rights corresponds on the whole with the enactments by Zurich; the law of Schaffhausen concerning public waters of January 19, 1874, which existed at the time of the change in sovereignty in question and is still in force coincides in all material respects with the law of April 14, 1872 (see No. 3 above), existing in the canton of Zurich at the time of its enactment and the latter contains as little, as do the general codifications of their private law, any provision restricting the duration of the water rights granted, so that such a limitation at all events is not mandatory law. The circumstance, that the modern practice of the authorities of Schaffhausen making such concessions, in conformity, to the modern tendency, expressed in the very recent water-works law of December 15, 1901, which aims at a definite limitation of all water rights as to time, is unable of course to change the result.

6. As a result of the foregoing considerations it follows that defendant must recognize the private right of usufruct in the Rhine belonging in perpetuity to plaintiff by virtue of its concessions from Zurich, both as to its legal existence and substance and according to its own legislation, in the sense that it is subject with respect to its continuance to the rules obtaining generally as to private rights, and that as a right of usufruct in public waters it is subject also to the provisions of the public law

applicable concerning state supervision, water taxes, etc., a fact which plaintiff evidently intends to admit expressly in the reservation contained in its prayer 2, which, however, was not stated in sufficiently general terms. As to the extent, the quantitative extent of this water right, it is to be measured, as shown above, by the terms of the concessions, respectively by the water works erected and used in accordance with such concessions. A determination in exact figures of the quantity of water, which may be used rightfully, cannot be ascertained from the above with certainty, contrary to plaintiff's contention. For both concessions of the years 1831 and 1833 describe merely the works to be erected and the new concessions of July 2, 1891, likewise speaks in its disposition only of "the changes made by reason of the new works of the water works company" in plaintiff's water works and mentions the quantity of water of 4500 liters per second, claimed by it in this action, and guaranteed to it per agreement of February 18, 1888, by the water works company of Schaffhausen, only in connection with a statement of such agreement, so that there can be no question of an express stipulation in the concession with regard to the quantity of water. It should suffice, however, to adjudge this point on principle, leaving it to the parties to reach an agreement as to the exact quantity or to have it determined in a new proceeding in conformity with expert testimony to be taken therein.

Disposition

1. Prayer 1 is not considered.
2. Prayer 2 is approved in the sense that the defendant, the canton of Schaffhausen, is adjudged bound to respect plaintiff's water right on the left banks of the Rhine at Flüringen, granted to plaintiff by the authorities of the canton of Schaffhausen, as one given in perpetuity and in extent measured by the concessions from Zurich.⁴

Legal opinion of Professor Max Huber in the Preceding Case on the Jurisdiction over Boundary Rivers

By the decision of the Swiss Federal Court of November 9, 1897, it was finally established that the canton of Schaffhausen had no jurisdiction over the southern half of the Rhine at the water-falls. The court did not define the respective rights of Schaffhausen and Zurich with respect to the use of the falls. Zurich, being anxious to exploit the water

⁴The above case is translated from the first volume of the *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1906), pp. 275-283.

power, asked Prof. Max Huber for an opinion, which, because of its general interest, was published in the *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, No. 1, pp. 29-32 and in No. 2, pp. 159-217. After a very extensive consideration of the Swiss federal law, the Swiss cantonal law and the general principles of international law having a bearing upon this question, the author states the following conclusions:

1. The decision of the Federal Court of November 9 is unassailable and therefore also the boundary rights established by it with respect to the whole distance of the Rhine between Zurich and Schaffhausen.

2. The river is divided realiter between the two cantons by a middle line and each canton has unrestricted jurisdiction over one half.

3. As the intercantonal jurisdiction over the Rhine-falls is not defined by federal law nor by intercantonal agreements, it is to be determined in accordance with the general rules of international law for the interpretation of which the following principal sources must be considered: the decisions of the Federal Court, the practice of the cantons of Zurich and Schaffhausen with respect to the exercise of jurisdiction over the Rhine, the principles of the private law of Zurich and Schaffhausen and the practice of the federal authorities with respect to jurisdiction over the Rhine, where it forms the international boundary.

4. The writers on international law have not developed a doctrine in regard to jurisdiction over international rivers, in particular in regard to rivers which are divided in the middle. The rules must be derived from the general principles of the law of vicinage.

5. The text-writers, the practice of courts, and particularly the intercantonal and international practice agree on the whole that each riparian owner has on principle full control over one half of the river and, therefore, may grant concessions for works located exclusively on its side, but that the adjoining state has an international right of protest, which cannot be lost through conflicting private rights, against all measures which may affect its territory injuriously. Joint action, though not a joint granting of concessions is necessary in all cases where a single establishment affects both territories with respect to rights in the river both riparian states stand upon an absolute equality.

6. Co-ownership or joint ownership cannot be presumed because it conflicts with the principle of territorial sovereignty.

7. In the case of a division of the river realiter as well as in case of joint ownership or co-ownership, every use of the river which may be regarded as a normal or customary one according to the conditions existing at that time, represents a *jus quaesitum* on the part of the riparian states. The granting of water concessions, resp. the granting of

permissions to draw water from the river for a certain distance is but a normal form of exercising jurisdiction over the river.

8. On principle, the two doctrines, (1) that of absolute territorial sovereignty, and (2) that of the right to the absolute inviolability of a territory with respect to influences from other states—which doctrines may possibly come into collision and very often lead to collision because of the flowing nature of water—apply both to land and rivers.

9. A state can protest against such influences only as are directly or indirectly prejudicial to its rights are unlawful.

10. The riparian states are mutually bound to maintain the physical integrity of the neighboring banks, *i. e.*, of the river banks.

11. Fishing interests as such are protected by international and federal law; in nowise could Schaffhausen, even if it had a fishing servitude under international law as to a part of Zurich's half of the Rhine, prohibit the erection of water works on the Zurich side.

12. Important interests of navigation cannot be injured by a work at the Rhine-falls, and the treaty of 1837 does not confer a right to navigation as such, but only a right to its undisturbed enjoyment by the members of both cantons, in so far as navigation is actually or legally possible.

13. Schaffhausen can ask of Zurich at most, that the Schaffhausen owners of water rights shall not be disturbed in the previous enjoyment of their water rights by any works on the Zurich side, nor that they otherwise be caused to suffer material damage. As these rights have been regulated by the interested parties already by contract, a protest by Schaffhausen based upon more ancient water rights is impossible in this case.

14. The portion of half the available power belonging to the canton of Schaffhausen and not used by it can be claimed by Zurich only if Schaffhausen does not utilize it within a reasonable time, resp. fails to utilize it for a sufficient legal reason.

15. No protest is possible on the part of private persons or in their stead by the canton of Schaffhausen by reason of any alleged interests in the maintenance of the Rhine-falls as a wonderful work of nature.

16. On the other hand, the state of Schaffhausen as such, has a legal interest in the maintenance of the Rhine-falls as a wonderful work of nature. This interest, however, has no precedence over the rights to use the river in other ways.

17. Schaffhausen can assert its right to the maintenance of the Rhine-falls as a wonderful work of nature only so far as the half of the Rhine on the Schaffhausen side is affected injuriously by water-power

works on the Zurich side. A protest against a mere optical, æsthetic effect, i, e., against a change merely affecting Zurich territory will lie under no circumstances. For that reason it seems permissible to divide the river in the middle by means of a dam.

18. There are no scales for measuring the different modes of exercising sovereignty over a river and international law does not recognize a procedure analogous to that of expropriation. Each state has a right to share each mode of enjoyment equally with its neighbor. If different modes of enjoyment on the part of the two riparian states collide, each mode of enjoyment is entitled to equal protection. The sacrifice of an unimportant interest of one in favor of more important interests of another could be asked at most, if considerations of equity should demand it. In the collision of the interests of Zurich and Schaffhausen, we are concerned with, a collision of rights relating in part to the northern half of the river, in part to the southern half. As far as Schaffhausen's half is concerned only collisions caused by physical influences can be legally taken into consideration and even then only so far as they are a result of a violation of the principles of equality on the part of both riparian states. There seems to be no such collision in this case. There is likewise no collision of rights on the Zurich half of the river, since Schaffhausen possesses no rights there, inasmuch as a state can have rights outside of its territory only by virtue of a special title which is lacking here and Schaffhausen's so-called æsthetic interests cannot be deemed legal rights. In the event of the recognition of Schaffhausen's claim to the whole Rhine-falls, Schaffhausen could ask of Zurich only the same moderation in the use of the falls as it has observed itself with reference to its half of the river.

19. The drawing of water, now taking place at Neuhausen, represents no international individual *jus quaesitum*, which would not prohibit a further drawing of water. If, however, in view of other interests a further drawing of water is prohibited or at most a smaller amount than that now taken by Schaffhausen, were allowed, Zurich may charge Schaffhausen, if it will not divide the river *in corpore*, a tax for that portion of the whole available power belonging to it by virtue of its title to one-half of the river, and in addition it could recover of Schaffhausen damages for the indirect benefit which it has lost, inasmuch as half of the power could not be used on Zurich territory.

20. The territory covering the Rhine-falls can be regarded constitutionally as national property at most in the sense of fiscal property of the confederation.

21. In case of water works whose premises cover merely the territory

of a single state, only the state of their *situs* has jurisdiction over the applicants for concession, resp. grantees of concessions. The right to protest against such works, resp. against their effect upon the adjoining territory is always a matter concerning exclusively the respective states in the absence of express or tacit agreement to the contrary.

22. Neither international law nor any other law applicable in any way to the determination of the question of jurisdiction over the Rhine between Zurich and Schaffhausen require the consent of one riparian state to the works erected on the territory of the other as an absolute condition precedent; there is a right of protest only, the Federal Court deciding as to its reasonableness and extent.

23. Since the concessions granted by a state, resp. the private rights acquired under them do not conflict with the international rights of other states, the only correct mode of proceeding must be deemed to be to submit to the neighboring state the plans of all works against which protest on its part seems possible before the definite granting of the concession so as to give it an opportunity to file such protests if desired. Changes in the plan submitted must be made within a reasonable time.

24. If co-ownership with regard to the river or to the water could be assumed, the rules of law governing its use would be the same on the whole as those given where there is a division realiter.

25. The Federal Court in its jurisdiction over suits between cantons can decide all disputes resulting from a collision of sovereignty over boundary rivers.

26. The Federal Court cannot refuse to assume jurisdiction on the ground that there are no rules governing the intercantonal jurisdiction over rivers.

27. The Federal Court decides as to the validity and extent of protests and in the case of co-ownership or joint ownership it would be competent to supply a consent wrongfully withheld.⁵

⁵ Zeitschrift für Völkerrecht und Bundesstaatsrecht (1906), pp. 213-217.

BOOK REVIEWS: BOOK NOTES

American Diplomacy: Its Spirit and Achievements. By John Bassett Moore, LL.D., Professor of International Law and Diplomacy in Columbia University. New York and London: Harper and Brothers. pp. xii, 286. 1905.

Professor Moore was happily inspired to prepare a series of articles for Harpers' Magazine on the spirit and achievements of American diplomacy, and author and publisher have put the reading public under obligation to them by rescuing the articles from the magazine and giving them a separate and permanent form.

In the new form the articles have undergone some revision and amplification and a chapter on the fisheries question has been added.

Professor Moore does not aim to present even in outline a history of our diplomatic relations. His book is a series of episodes in diplomatic history, well chosen and carefully treated.

The book, therefore, necessarily lacks the continuity of John W. Foster's *Century of American Diplomacy* and the two works, different in origin and purpose, differ not unnaturally in execution. They do not cover the same field although they deal with the same general subject, nor do they compete in any way. They are both good books, and place the general reader and lay public under a personal obligation.

After a brief introductory note on the conduct of foreign intercourse with a list of the secretaries of state, Professor Moore takes up the scattered threads of his subject and weaves them into a graceful and consistent whole. The chapter on the beginnings (pp. 1-32) is historical and in a sense introductory. It is, as its fellows, interesting and capitally written. The account of the treatment of Arthur Lee in Berlin, and the dastardly theft of his papers by the British minister, one Hugh Elliot, is likely to bring a blush to the face of the Briton. Such a transaction is, it is to be hoped, impossible today among men of honor and nations of respectability.

Professor Moore passes from the beginnings to the system of neutrality (pp. 33-62), the establishment of which he rightly attributes to American publicists. This claim even Hall, no lover of things American, is forced to admit. Then follows the freedom of the seas (pp. 63-86), in which matter the American navy and American publicists happily and

successfully coöperated. It cannot be said that American diplomacy has scored a triumph in the fisheries questions (pp. 87-104) but that chapter is not finished yet and it may well be that the final settlement of the fisheries questions will be favorable, at least more favorable to the American contention. The contest with commercial restrictions (pp. 105-130) shows American energy and effort in a more favorable and pleasing light. The next chapter on non-intervention and the Monroe doctrine (pp. 131-167) appeals peculiarly to readers in this part of the world, and rightly or wrongly we ascribe great importance to Monroe and the doctrine which bears his name, although John Quincy Adams would seem to have a right to father it. The claims of Richard Rush and George Canning cannot be overlooked in any just apportionment of credit for the doctrine of non-intervention and its application to America in the twenties. The doctrine of expatriation (pp. 168-199) is peculiarly American, as was to be expected from a nation that exterminated the only natives of the country. The American is an expatriated foreigner one or more degrees removed. But it must be confessed that we are somewhat inconsistent, proclaiming as we do the right of expatriation for others without being equally anxious to allow the right to our citizens. When inconvenience arises, we shall doubtless make theory and practice square. As was to be expected, Professor Moore's treatment of the often misunderstood *Koszta* case is clear and accurate. International arbitration (pp. 200-222) may be dismissed with the statement that Professor Moore is the recognized American authority on this subject. The chapter on the territorial expansion of the United States (pp. 223-247) traces the growth of the republic from seaboard to seaboard and conducts the reader without the danger of wetting his feet across vast wastes of water. An excellent map shows the continental expansion of the United States more clearly than language.

In the concluding chapter (pp. 248-266) Professor Moore deals with influences and tendencies. The influence of the United States he finds to consist in the establishment of liberty and self-government at home and in blazing the way for European reforms. He calls attention to the patent fact that we have carried on an intellectual not an armed propaganda, as did the French revolution for ideals of liberty. The liberty of the country was necessarily reflected in our diplomacy.

The influence of the United States in behalf of political liberty was clearly exhibited in the establishment of the principle that the true test of a government's right to exist and to be recognized by other governments is the fact of its existence as the exponent of the popular will.

Again:

American diplomacy was also employed in the advancement of the principle of legality. American statesmen sought to regulate the relations of nations by law, not only as a measure for the protection of the weak against the aggressions of the strong, but also as the only means of assuring the peace of the world.

And finally:

American diplomacy has been characterized by practicality. It has sought to attain definite objects by practical methods. * * * American diplomacy has also exerted a potent influence upon the adoption of simple and direct methods in the conduct of negotiations. Observant of the proprieties and courtesies of intercourse but having, as John Adams once declared, "no notion of cheating anybody," American diplomatists have relied rather upon the strength of their cause, frankly and clearly argued, than upon a subtle diplomacy, for the attainment of their ends.

In commending this book without reserve to the general reader, for whom it is primarily intended, the reviewer congratulates the reader on the fact that specialists and men of affairs, such as Professor Moore and John W. Foster, have found time and taken a pleasure in laying before the public the results of a lifetime in a simple, accurate and attractive form. May other publicists imitate their example.

JAMES BROWN SCOTT.

Recueil des Arbitrages Internationaux. Tome Premier, 1798-1855. By Professor A. de Lapradelle, of the University of Grenoble, and Professor N. Politis, of the University of Poitiers. Paris: Pedrone. pp. liv, 863. 1905.

We note in this publication one of the most valuable productions yet issued covering questions of international law as administered upon references either to mixed commissions, or to special persons, and believe the words of the preface, appreciatively written by Professor Renault, are within bounds in saying that the editors "have rendered an eminent service to the practice and the science of international law."

The present volume covers the period from 1798 to 1855 and will be followed by others bringing the subject matter up to the date of final publication. The editors have commenced with the arbitrations under the Jay treaty and, among other important arbitrations, include the affair of the Duchy of Bouillon; the tolls of the Levantine Valley; the Holland debt between Holland and France; the four mixed commissions between the United States and Great Britain following the treaty of Ghent; arbitration of Alexander I., over the application of the first article of the treaty of Ghent to slavery; the Northeast boundary line;

the mixed commission of 1842 between the United States and Mexico; the Portendick affair between France and Great Britain; the arbitration between France and Mexico under the treaty of 1844 relative to responsibility for acts of war; the Pacifico affair between Great Britain and Greece; arbitration under the treaty of 1852 between France and Spain; the arbitration between the United States and Portugal relative to the destruction of the *General Armstrong*; and conclude with an account of the mixed commission of 1855 between the United States and England.

Pursuant to their general plan and in connection with each arbitration, the editors state very fully the circumstances leading up to it, the procedure in connection therewith, the protocol and the questions decided by the commission, the cases being grouped according to their nature and each particular question being made the subject of extensive and valuable doctrinal notes. Where the arbitrations are of a single dispute, the text of the arbitral sentence is given. The doctrinal notes in question were many of them written by the editors, but, in addition, we note, as adding to the value of the work, the names subjoined of Stoerk, Asser, Laband, Fauchille, Kleen and Strisower.

The editors have carefully distinguished between international arbitrations in the strictest sense on the one hand, and internal commissions appointed for the purpose of adjusting claims against foreign nations assumed by the home government, and arbitrations really diplomatic arrangements, on the other. Observing strictly this line of cleavage, many of the boards whose proceedings were quite fully reported in Moore's *International Arbitrations* receive no attention at the hands of the editors, who consider that their opinions are not in the fullest sense evidence of international law.

In their *avant-propos*, the editors discuss in an interesting and able manner the vices and virtues incident to the various forms of arbitration, contrasting judiciously the earlier form of the mixed commission, wherein there sat one of the nationals of each contending party with an umpire who by lot or agreement was chosen from the citizenship of the contesting nations, with the plan of referring a dispute to a sovereign, pointing out as well later developments in form tending to secure absolute impartiality among all the arbitrators, the authors anticipating as the best and final development a court on which no national shall appear. The evils incident to the older form of mixed commissions are indicated with sufficient clearness. The dangers of an improper decision in the event of a reference to an outside power are clearly defined, more so than in any other publication to which we can refer.

The work under review will naturally be contrasted with Moore's

International Arbitrations, from which, for American material, it largely draws. We have pointed out above the class of commissions which might be termed quasi-international, whose work is not considered by the present authors, and because of this omission one work is needed to supplement the other by the student who would desire to acquaint himself with all phases of arbitral discussion. In addition many details interesting particularly to Americans and contained in Professor Moore's work do not come within the scope of the present one. The plan of the *Recueil* differs markedly from that adopted by Professor Moore in that, as indicated, all questions arising under a given commission are grouped together, falling as well under the common head. It also differs in the greater fullness naturally given to the arbitrations of continental Europe and in that the doctrinal and footnotes bring the general subject up to a later date, many of the doctrinal notes being so extensive as almost to constitute treatises upon the matters to which they relate. Particularly is this true with regard to the law of prize and the sanctity to be accorded to the decisions of prize courts when invoked before an arbitral tribunal. The various heads under which a government may be made responsible internationally are also discussed with learning and ability.

The volume includes chronological tables, as well as an alphabetical table by nations of matters affecting the general subject, and embraces what is rare in French treatises—a most excellent index, largely adding to the value of the work.

We shall await with interest the forthcoming volumes. It is perhaps proper to add in closing that the same authors have recently published a study of the Anglo-Brazilian Arbitration of 1904. (*L'Arbitrage Anglo-Brésilien de 1904*. Paris: Giard et Brière. pp. 105. 1905.)

JACKSON H. RALSTON.

A Digest of International Law. By John Bassett Moore, LL.D., Hamilton Fish Professor of International Law and Diplomacy in Columbia University in the city of New York; Associate of the Institute of International Law; some time third Assistant Secretary of State and Assistant Secretary of State of the United States. In eight volumes. Washington: Government Printing Office. 1906.

The title page of this monumental work explains and it is necessary that the reader have it before him, that the *Digest* is based upon diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts, the writings of and especially on published and unpublished documents issued

by presidents and secretaries of state of the United States, the opinions of the attorneys-general, and the decisions of federal and state courts.

Passing from the title page to the preface, the enormous labor and value of the Digest become apparent at once. The act of Congress of February 20, 1897, under which the work was undertaken, provided for

revising, reindexing and otherwise completing and perfecting by the aid of such documents as may be useful the second edition of the Digest of the International Law of the United States.

The framers of the act evidently had in mind a thorough revision of the Digest of the International Law of the United States, prepared and published in 1886, by the late Dr. Francis Wharton, solicitor for the Department of State. As Professor Moore had largely aided Dr. Wharton in the preparation of this work, it was but natural that Professor Moore should be selected to prepare the new edition, and his thorough familiarity both with the subject and the subject matter would have made the preparation of a new edition comparatively simple. But Professor Moore, alive to the excellencies of Dr. Wharton's work, was no less aware of its deficiencies and he wisely determined to prepare a wholly new work in which the Digest of Dr. Wharton should be merged. For, as Professor Moore says, a mere revision must have been both inadequate and incongruous, and a revision, with supplementary sections, could hardly have been more satisfactory. The result of this momentous and generous decision is the monumental work which is at once a digest and treatise on international law as interpreted, understood and applied by the United States.

In the execution of the plan, Professor Moore states that he has had two points of capital importance in mind. To quote his exact words:

One is that mere extracts from state papers or judicial decisions cannot be safely relied on as guides to the law. They may be positively misleading. Especially is this true of state papers, in which arguments are often contentiously put forth which by no means represent the eventual view of the government in whose behalf they were employed. Instead, therefore, of merely quoting extracts from particular documents, it has been my aim to give the history of the cases in which they were issued, and, by showing what was finally done, to disclose the opinion that in the end prevailed.

The second capital point concerned the proper treatment to be accorded to manuscript documents, in order

to avoid giving brief glosses which convey no intimation of the question under consideration but to follow and, wherever practicable, quote the text, and to give besides enough of the facts to render the application apparent. * * * The documents were first found, read and marked by myself personally, the figures of reference were then

taken by my copyists, and these figures have all been verified and omissions supplied in the proof.

This personal examination of the manuscript records of the Department of State began with the earliest document on record and the systematic and minute gleaning ended with the date of July 1, 1901. But this statement is not quite accurate, for the learned author has drawn upon manuscript sources since that date, relating to specific topics. The printed documents were consulted and drawn upon until the Digest went to press.

The mere statement of the plan and manner of its execution shows even to the casual reader that he has here a colossal enterprise, which embraces within its covers an analysis and presentation of the foreign policy of the United States from its independence until the present day.

It remains to be seen in how far the Digest corresponds to the plan and whether its execution is as admirable as the conception.

To say that the reviewer has read every page of this monumental undertaking would be to prejudice the review in advance; for digests are not easy reading and the volumes of this work are not of a kind to slip into the pocket for a ride in the cars or a trip into the country. The reviewer has, however, examined carefully every volume and at times this examination has been pushed, by the necessities of official study, into minute details, with the invariable result that in no single instance has an inaccuracy of statement been discovered, although a few trifling misprints have occasionally met the eye. The literature on the subject has constantly been given by Professor Moore; the foreign relations, the opinions of attorneys-general; the decisions of courts; the opinions of secretaries of state and of American and foreign publicists, and the views of learned societies of international law have been found in their appropriate places. The impression borne in upon the reviewer, and which he means to convey, is that this monumental work of Professor Moore makes a reference to the volumes of Foreign Relations and to the sources quoted unnecessary in the vast majority of cases. The work is in the severest sense of the word a digest and treatise, and it is as accurate as it is full and detailed. It is a godsend to the man of affairs and it is a sure and safe guide to the student of international law.

The usefulness of the Digest as a whole is greatly enhanced by the elaborate index which occupies the first hundred and sixty-four pages of the eighth volume, which is, in the language of Professor Moore, "indexical." By means of the admirable fullness and detail of this index, the entire work is placed at the disposal of the student. Its omission would have been a serious fault; its execution renders it a

matter of a few moments to find any topic in the Digest. The list of cases cited (pp. 165-215) follows the general index and this too is serviceable inasmuch as the reference is given to the original report as well as to the page of the Digest. The balance of the volume, consisting of an alphabetical list of documents (pp. 217-453), likewise justifies its existence and simplifies reference to the work as a whole.

Professor Moore was required by the terms of the act of Congress to produce a digest of the international law of the United States. This he has done, but in the doing calls attention to the inaccuracy of the title; for there is, strictly speaking, no international law of the United States, distinct and separate from the international law of the civilized world. As Professor Moore says:

The phrase is itself a misnomer and conveys an implication which the government of the United States has always been the first to repel, for it has ever been the position of the United States that international law is a body of rules common to all civilized nations, equally binding upon all, and impartially governing their mutual intercourse.

Or to adopt the weighty and measured language of Cicero:

Neque erit alia lex Romæ, alia Athenis, alia nunc, alia post hac; sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis contenebit, unusque erit communis quasi magister et imperator omnium Deus.

JAMES BROWN SCOTT.

The Practice of Diplomacy as Illustrated in the Foreign Relations of the United States. By John W. Foster, author of *A Century of American Diplomacy*; *American Diplomacy in the Orient*, etc. Boston and New York: Houghton, Mifflin and Company. pp. [x] 401. 1906.

A worldly maxim informs us that wine improves with age, which may or may not be true, but it is a fact that the present fruit of Mr. Foster's labors is a confirmation of the maxim and a distinct credit to his vintage.

Mr. Foster's various volumes are, as it were, an afterthought and in a way the result of a happy accident. After a generation spent in the diplomatic service, and after rounding out a distinguished career as secretary of state in President Harrison's cabinet, Mr. Foster became professor of diplomacy in the George Washington University. Instead of becoming ascetic with age, as has frequently happened, Mr. Foster has become academic and literary, and the books which he has written in the past few years are the direct outcome of his professorate.

The first fruit of his academic activity was the well known *Century of American Diplomacy*—a brief review of the foreign relations of the

United States, 1776-1876. Of the merits of this work, which won instant favor with the reading public, this is not the place to speak. But it is well to call attention to this admirable and in many ways charming book because the distinguished author has prepared the *Practice of Diplomacy* "as a companion volume and complement" of a *Century of American Diplomacy*. The intervening volume, *American Diplomacy in the Orient*, was the result of personal and professional interest in the affairs of the Far East.

In order to estimate a book and its value as a book it is necessary to discover the intent of the writer and then to see in how far and with what success the author has executed that intent. In the brief preface to the book under consideration, Mr. Foster states that

the present work is intended primarily to set forth the part taken by American Diplomats in the elevation and purification of diplomacy; and, secondarily, to give in popular form, through such a narrative, the rules and procedure of diplomatic intercourse. While it is prepared for the general reader, numerous citations of authorities are given to enable the student to pursue his investigations by an examination of the original sources of information.

Mr. Foster expressly disclaims any intention to make the work a manual of diplomatic procedure. The purpose of the distinguished author is therefore popular rather than scientific, and his aim is to give the general reader an outline of the practice of diplomacy rather than to present a detailed treatise. The work is emphatically a work of *vulgarization* and as such a distinct success.

There is an idea prevalent that the diplomatic service is not what it used to be. This is so, for the service is distinctly better and more respectable than ever before. But this is not exactly what is meant, for the critic really means that steam and electricity have rendered the diplomat useless other than as a diner-out. In this latter capacity, it cannot be denied that he performs onerous as well as representative duties and that he thus brings his country, as it were, into our very homes, and therefore in close and intimate relations with our people, or at least with some of them. But the critic of the diplomatic corps forgets that the duty of the diplomat is not solely with the foreign office of the home country or indeed with the Department of State in Washington. He represents in a real and vital sense the interests of his fellow-countrymen in distress who need disinterested advice and competent guidance. The diplomat of today is not so independent as he was a century ago; but he is really a more useful being. Mr. Foster performs no small service in making this clear to the general reader.

In the second chapter, Mr. Foster deals with the rank of diplomats and

makes it clear that efficiency is not a thing of gold braid, and that the service rendered bears no necessary or reasonable relation to the rank of the diplomat. The head of the procession; a seat at the right or the left may be more enjoyable; it may be embarrassing to wait until ambassador so-and-so has had his audience and conveyed to the secretary of state the assurance of his high official and personal esteem. But the brain is the thing that counts. When Dr. Franklin, braidless and guiltless, was presented at the French Court it does not appear that the interests of his country suffered because he was not an ambassador. And when mothers in the street held their children in their arms that they might catch a sight of the man in homespun, it did not occur to anyone to question his rank. It is doubtful if Charles Francis Adams could have prevented the sailing of the *Alabama* had he been accredited personally to her majesty instead of to her government, nor is it to be supposed that James Russell Lowell would have represented more clearly, and therefore more truly, the intelligence of the republic and the desire of the enlightened for friendship with the mother country, if he had been in name what he was in fact, an ambassador. The service wants men; not apologies for men. Increased rank will never make up for the absence of brain power. But money and brains do not necessarily go together and so it happens that the poor man of ability cannot accept a position which seemingly requires an expenditure of many times his salary. If, therefore, our diplomats are to entertain and cater to the stomach as is the rule of today, we must select only men of means or increase the salaries of our diplomatic representatives, so that they can meet the demands of the service from the official salary. This is adequately pointed out by Mr. Foster, and members of Congress could read his pages with no little profit.

Mr. Foster points out in the first two chapters of his book, the usefulness of the service and the need of efficiency in the service. And it is the reviewer's opinion that these two chapters would justify of themselves the existence of this interesting and valuable book. The balance of the work may be grouped as follows: Diplomats—their appointment, reception, termination, duties and immunities (pp. 34–215); the consular service (pp. 216–242); treaties—their negotiation, ratification, interpretation and termination (pp. 243–311). These chapters are interesting and replete with accurate information. Their mastery is easy and is essential to the well-informed citizen. The chapter on arbitration and its procedure (pp. 330–358) is timely and outlines a record of peace and justice which will rebound to the lasting credit of our country. The final chapter on international claims (pp. 359–381) is of great

interest, and there will be not a few who will consider it the most distinct and valuable contribution in the book. The layman knows little of the subject and there are few articles or treaties to which he can turn for information. This chapter supplies the reader with the essential knowledge and it does it well and within small compass.

The work is the outcome of practical experience, it is pleasingly written and is interspersed with passages of amusing and happy incident. It is also timely, and a careful reading of the *Practice of Diplomacy* from cover to cover leads to the conclusion and the hope that it will inevitably find its way to the general reader, for whose instruction and pleasure it has been specially written.

JAMES BROWN SCOTT.

The Aliens Act and the Right of Asylum. By N. W. Sibley, B.A., LL.M., Trin. H. Camb, Barrister-at-Law of Lincoln's Inn, and Alfred Elias, LL.B., Victoria University, Barrister-at-Law of Gray's Inn. London: William Clowes and Sons, Limited. pp. xi, 161. 1906.

This little book is a model comment upon the aliens act, 1905 (5 Edw. VII., C. 13) and in the brief compass of a trifle over one hundred and fifty pages, gives the historical setting and analysis of the act as well as a valuable appendix upon the right of asylum in the law of England.

Perhaps the best way to give an idea of the scope of this little book will be to give the table of contents: Part I, pp. 1-17, deals with international law on the admission of aliens, the *droit du Renovi* and the right of asylum; part II, pp. 18-30, outlines the comparative jurisprudence on the prohibition against access of alien immigrants, on the removal of aliens and the right of asylum; part III, pp. 31-82, the status of alienage; the history of legislation in Great Britain on the subject of the admission, expulsion, residence of aliens; an analysis of the aliens act; a table of punishments and penalties under the aliens act.

Appendix I, pp. 83-124, gives the text of the act and the rules and orders made under the act; Appendix II, pp. 125-137, is an admirable section on the right of asylum in the law of England, and Appendix III, pp. 138-144, is made up of statistics from parliamentary papers on alien immigration for the last decade into the United Kingdom. A detailed and highly serviceable index, pp. 145-161, places the little book completely at the disposal of reader and student.

The text is carefully written and in it the immigration acts of the United States are considered and approved, and a brief survey is given of the subject in continental law.

The principles of international law involved are presented clearly and in brief form and the leading authorities are freely cited. The various English cases on the subject are discussed and at least one American case is cited. One passage is quoted:

It is probably the most important feature of the aliens act, the severest act on the subject of alien immigration, in many respects, that has found a place on the statute book for eighty years, that it should contain the most comprehensive declaration of the right of asylum that is to be found in the whole range of municipal legislation, not merely in the history of this country [Great Britain], but throughout the civilized world.

The section of the act referred to (s. 1 sub-s. (3) says:

In the case of an immigrant who proves that he is seeking admission to this country, solely to avoid persecution or punishment on religious or political grounds or for an offense of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused on the ground merely of want of means, or the probability of his becoming a charge on the states.

The spirit of this pronouncement, as wise as it is humane, is respectfully called to the attention of law makers and administrative officers, lest we debar unawares a Romilly or deport a Carl Schurz.

JAMES BROWN SCOTT.

Report of French-Venezuelan Mixed Claims Commission Under Protocol of 1902. Prepared by Jackson H. Ralston, umpire of the late Italian-Venezuelan Mixed Claims Commission, assisted by W. T. S. Doyle. Washington: Government Printing Office. pp. xii, 471. 1906.

This volume is supplementary, or, at least, complimentary, to Venezuelan Arbitrations of 1903, issued under the same editorship. The convention of 1902 between France and Venezuela provided for the adjustment by way of arbitration, first, of all claims arising by reason of insurrectionary events in Venezuela in the year 1892, and, second, all other claims arising out of events prior to May 23, 1899, when the insurrection headed by General Castro broke out. Later claims were settled by arbitration under the protocol of 1903, as reported in Venezuelan Arbitrations of 1903. Work under the prior protocol was not completed until the summer of 1905; hence the delay in the appearance of the present volume.

This publication contains the opinions of the French and Venezuelan arbitrators and of Honorable Frank Plumley, of Vermont, the umpire, including as well opinions affecting claims arranged directly between the arbitrators, together with a systematic table of cases and authorities

cited, and index. The cases now reported—eight in number—touch a number of interesting questions, including the responsibility of a government to foreigners for avoidable loss in military operations; the right to take jurisdiction when the claimant is only informally present; the freedom of the respondent nation from responsibility when the laws governing her courts relating to the matter in dispute were the product of civilization and have been reasonably executed; responsibility of governments for failure to punish officers who had injured foreigners; the determination of conflict of laws relative to citizenship by the place of domicile; rules of interpretation of treaties; effect of a previous award as *res judicata*; want of responsibility for damages not direct and approximate; effect of marriage upon citizenship of claimant; responsibility for losses accruing from unjustifiable refusal to permit the transfer of a franchise; liability of a government for damages to railroad property used by the government or by successful revolutionary forces.

The claimants demanded, in round numbers, \$8,100,000 and recovered \$668,000.

In connection with Venezuelan Arbitrations of 1903, this work will prove a useful addition to the law of international claims as laid down by arbitral tribunals.

The Legislative History of Naturalization in the United States from the Revolutionary War to 1861. By Frank George Franklin, Ph.D., Professor of History and Political Science in the University of the Pacific. Chicago: The University of Chicago Press. 12mo, pp. 308. 1906.

The subjects treated are of the Revolutionary period, the convention of 1787, the various acts of Congress up to the Civil War, expatriation and the native American movement.

The treatment is clear and accurate, and, so far as it goes, the book is all that could be desired. It was written before the report of the naturalization commission was presented to Congress in December, 1905, but published after the report, so Dr. Franklin and the commission did not profit by each other's labors which was an unfortunate circumstance for both, for they covered in part the same field. The subject is, however, one of continuous interest and Dr. Franklin's book will prove a valuable addition to its permanent literature.

Dr. Franklin shows that late in 1776 the Continental Congress required soldiers at enlistment in the American army to take an oath "to be true to the United States of America and to serve them honestly and faithfully;" later it required from all civil officers an oath acknowledging

the independence of the United States and denying allegiance to the British king. Before this it had declared that "all persons abiding within any of the United Colonies and deriving protection from the laws of the same" owed allegiance to such laws and were "members of such colony," and this the author correctly considers to have been definition of citizenship.

In the constitutional convention we find an effort on Madison's part in the Virginia plan to recognize a new citizenship which was vigorously contested but finally accomplished. Nevertheless, when the first act of naturalization was proposed in 1790 many members of Congress thought the matter ought to be left completely in the hands of the states and the law finally passed left it at the mercy of state courts. There, the reviewer may add, it remained until the passage of the act of June 29, 1906, gave the federal government for the first time effective control over the naturalization courts.

About 1833 there began to be agitation against the admission of more immigrants to the United States and the party of native Americans began to form. We had the "know-nothings" with us, however, from the very beginning and we have them now.

One of the most interesting chapters in the book is that on expatriation, for the efforts to pass a law on that subject have commonly been overlooked.

The bibliography which Dr. Franklin gives is only partial. He omits, for example, such well-known works as Morse's *Treatise on Citizenship and Naturalization* and Van Dyne on *Citizenship*.

International Law: A Treatise. By David J. Brewer, Associate Justice United States Supreme Court and Charles Henry Butler, United States Supreme Court Reporter. Reproduced from the *Cyclopedia of Law and Procedure*. New York City: The American Law Book Company. pp. 62. 1906.

The publishers of the *Cyclopedia of Law and Procedure* have thought so highly of this little treatise that they have issued it in separate form. The names of the authors guarantee the text and the text reflects credit on the learned authors. Good wine needs no bush.

The chief characteristic of this brochure is the wealth of adjudged cases cited by the authors to support the text. In this respect the little treatise is *sui generis*.

Strange as it may seem this outline of international law far exceeds any treatise in its elaborate consideration of claims of citizens against foreign states (pp. 38-60). A deal of information is crowded into

these pages and the student as well as the busy practitioner will find these twenty pages of genuine value.

Brief as it is this outline is a distinct contribution to the literature of international law and the publishers were worldly wise when they issued this article in separate form.

American Consular Jurisdiction in the Orient. By Frank E. Hinckley. Washington, D. C.: W. H. Lowdermilk and Company. pp. xx, 283. 1906.

Dr. Hinckley traces the history of American consular jurisdiction in the Orient, devoting especial attention to American legislation, and to the act of June 30, 1906, which created a United States court for China. The appendix collects statutes, treaties, and other important documents bearing upon consular jurisdiction in the East.

The work is admirably done and is a credit to American scholarship. It is therefore a pleasure to state that upon the organization of the court for China, Dr. Hinckley was appointed clerk, so that the man and book are of great service to the public and are likely to continue so for many a day.

Manuel de droit international public. Par Henry Bonfils. Quatrième édition par Paul Fauchille. Paris: Rousseau, pp. viii, 933, 1905. Bonfils' Manuel is now too well known to need much comment. It is fortunate that it should have had, in its second, third and fourth editions, so capable an editor as M. Paul Fauchille. The new edition has been brought up to date, with numerous illustrations drawn from the Russo-Japanese war, and will maintain the position of this work as one of the best one volume treatises upon international law. A German edition of Bonfils appeared in 1904, under the editorship of August Grah. (Berlin: Heymann.)

A fourth edition has recently been published of Prof. Franz von Listz's admirable little treatise, *Das Völkerrecht, Systematisch dargestellt*. (Berlin: Haring, 1906.) In less than five hundred pages (xiv, 482) the learned author manages to present international law as a system as well as to print in an appendix (pp. 371-463) important documents of international law.

A fifth edition has been issued of Georges Bry's *Précis élémentaire de droit international public*. (Paris: Larose et Tenin, pp. viii, 689, 1906.)

Völkerrechtsquellen in Auswahl herausgegeben. Von Max Fleischmann. Halle, a S.: Waisenhaus. pp. xxii, 380. 1905.

This is the age of the study of documents, and the object of Dr. Fleischmann's collection is to make available to students the most

important treaties and other international documents which bear upon the principles of international law. The selection of material is well made; the valuable explanatory notes and the references to the literature of the subject greatly enhance the usefulness of the collection to students. The selections are arranged chronologically, but an excellent index enables one to find easily the parts of treaties or documents which treat of special subjects. It is impossible to commend the book too highly.

The Purchase of Florida: Its History and Diplomacy. By Hubert Bruce Fuller, A.M., LL.M. Cleveland: The Burrows Brothers Company. pp. 399. 1906.

Mr. Fuller has worked in an almost unexplored field, and the result of his labors is a thorough account of our early diplomatic relations with Spain. The study is based very largely upon manuscript sources and all American material in print seems to have been used. The author seems not to have examined the Spanish archives, and must thus have missed much valuable material bearing upon his subject.

The Consular Service of the United States: Its History and Activities, by Chester Lloyd Jones (Philadelphia: 1906, pp. ix, 126), appears as no. 18 of the publications of the University of Pennsylvania, Series in Political Economy and Public Law. The author compares the American consular service with European consular systems and makes suggestions for the improvement of our service. Many of the suggested changes have been brought about by legislation and by executive order since the publication of this study.

The *Manuel Historique de la Question du Schleswig*, edited by Franz de Jessen (Copenhagen: pp. 473, 1906), is a French edition of a collection of papers published in Danish in 1901. The French translation is now brought out in order to give to the world a Danish view of the recent antagonism between the Prussian administration and the Danish population of Schleswig. Of particular interest to students of diplomatic history are the papers which bear upon the conquest of Schleswig and Holstein by Austria and Prussia in 1864.

La république et le canal de Panama, par Henri Pensa (Paris: Hachette, 1906). M. Pensa's work is devoted largely to the economic and geographic problems of the canal; the chapters devoted to the diplomatic history are written in a friendly spirit. The author thinks the United States was justified by conditions in its hasty recognition of the republic of Panama. He does think, however, "que la politique extérieure

des États-Unis, telle qu'elle est formulée dans l'interprétation actuelle de la doctrine de Monroe, a atteint l'extrême limite compatible avec les intérêts des autres nations" (p. 262).

M. Charles de Freycinet in *La Question d'Egypte* (2d ed., Paris, Calmann-Lévy, 1905), studies the relations of European countries to Egypt since the Napoleonic expedition of 1798. It would seem that there has almost ceased to be an international question of Egypt since the Anglo-French convention of 1904. M. de Freycinet, however, still regards the English occupation as temporary, and suggests the return of Egypt to Turkey, or its neutralization under the guarantee of the great powers. It is to be feared the wish is father to the thought.

International Law with Illustrative Cases. By Edwin Maxey. St. Louis: F. H. Thomas Law Book Co., pp. xxii, 797, 1906. This is a combination of treatise and leading cases, prepared for the use of students. It can hardly be called successful in what it undertakes, although it may be of some value to students.

Early Diplomatic Negotiations of the United States with Russia, by John C. Hildt (Baltimore: pp. 195, 1906) forms numbers 5 and 6 of Series xxiv of the Johns Hopkins University Studies. The author closes his study with the year 1824.

In *Traité de la France avec les pays de l'Afrique du Nord* (Paris: Pedone, pp. xv, 422, 1906) E. Rouard de Card presents a documentary history of the growth of French influence in Northern Africa.

The *Recueil international des traités du XX^e Siècle* is an important addition to the publications which give currently the texts of treaties and of other international documents. The *Recueil* is edited by Baron Deschamps and M. Louis Renault, and is published at Paris by A. Rousseau.

Baron A. Heyking, Russian state consul for Scotland and the Northern counties of England, issued in 1904, *A Practical Guide for Russian Consular Officers*. (London: Eyre and Spottiswoode, pp. xii, 298.) The book contains detailed information as to the legal position of foreigners in Russia.

La Traité Négrière aux Indes de Castille. Contrats et traités d'Assiento. Par Georges Scelle, vols. i and ii. Paris: Larose et Tenin, 1906. M. Scelle presents an exhaustive study, from manuscript sources, of the political and diplomatic history of the contract of Assiento. The work will be completed in three volumes.

L'Affaire Marocaine, by Victor Bérard (Paris: Armand Colin, 1906), was written before the Algeciras conference but gives a good account of the Moroccan situation, and of the events leading up to the conference.

La diplomatie de la troisième république et le droit des gens, by Frantz Despagenet (Paris: Larose, pp. viii, 806, 1904), is one of the important recent works upon diplomatic history.

Volume iii of Edouard Rott's *Histoire de la Représentation Diplomatique de la France auprès des Cantons Suisses* (Berne: 1906), covers the years 1610–1626.

Les lois de la guerre continentale (Paris: 1904) is a translation with notes of a volume issued in 1902 by the historical section of the German General Staff. The translation is by M. Paul Carpentier, who criticises the German work as departing from the principles laid down in the Hague convention of 1899 for the conduct of war on land.

Zeitschrift für Völkerrecht und Bundesstaatsrecht, edited by Professor Josef Kohler, began to appear in January, 1906, at Breslau. As its title indicates, this periodical will devote a large share of its attention to international law. The issues are excellent in quality and fully abreast of the requirements of German scholarship.

The *Rivista di diritto internazionale* was begun at Rome in January, 1906, and will appear bi-monthly. The Rivista embraces within its scope both public and private international law. Its first numbers are very creditable to Italian scholarship in these fields.

The *Revista de derecho internacional y política exterior* has appeared since 1905 at Madrid, under the editorship of the Marquis de Olivart. Its field, as expressed in its title, is that of international law and foreign policy.

Two important works on submarine cables have recently appeared: *Krieg und Seekabel. Eine völkerrechtliche Studie*, by Franz Scholz (Berlin: Vahlen, pp. iv, 161, 1904); and *Les Cables sous-marins, leur protection en temps de paix et en temps de guerre*, by Pierre Jouhannaud. (Paris: Larose et Tenin. pp. 320. 1904.)

Der Tatbestand der Piraterie nach geltendem Völkerrecht, by Paul Stiel (Leipzig: Duncker und Humblot, pp. xi, 117, 1905), forms a part of the *Staats- und völkerrechtliche Abhandlungen*.

Die Kriegskonterbande in der Völkerrechtswissenschaft und der Staatenpraxis, by Max Wiegner (Berlin: Heymann, pp. xxiv, 360, 1904), is a careful study of the historical development and of the present state of the law of contraband.

Das Untersuchungsrecht des internationalen Seerechts in Krieg und Frieden, by Dr. Max J. Lowenthal (Berlin: Ebering, pp. 185, 1905), appears as Heft 18 of the *Rechts- und Staatswissenschaftliche Studien*.

A new edition appeared in 1905 of R. Monnet's *Manuel diplomatique et consulaire*. (Paris: Berger-Levrault. pp. vi. 438.)

The Law of Aliens and Neutralization, by H. S. I. Hemiques (London: Butterworth, 1906), is a commentary upon the English aliens act of 1905.

Spanish-American Diplomatic Relations preceding the War of 1898, by H. E. Flack, is a recent publication of the Johns Hopkins University Press.

The Report of the Twelfth Annual Meeting of the Lake Mohonk Conference on International Arbitration, 1906, contains many interesting papers and addresses upon the subject of international arbitration.

Régimen internacional de los rios navegables, by Ismael López (Bogotá: pp. xiii, 112, 1905), discusses the subject with especial reference to Colombian policy.

The International Position of Japan as a Great Power (New York: MacMillan, 1905, pp. 289), by Saiji George Hishida, forms a recent number of the Columbia University Studies in history, economics and public law.

Achille Viallate's *Essais d'histoire diplomatique américaine* (Paris: Guilmoto, 1905, pp. iii, 306) is composed of essays on "Le développement territorial des États-Unis," "Le Canal interocéanique," and "La guerre hispano-américaine."

Les lois de la guerre et la neutralité (Bruxelles: Schepens, 2 vols., 1906) is a recent work by Fernand Verraes. It will be reviewed in a later number of the JOURNAL.

Ernest Nys' *Le droit international; Les principes, les théories, les faits* (Bruxelles: Castaigne, 1904-1906) has recently been completed by the publication of part 2 of volume 3. It will be reviewed in a later number of the JOURNAL.

Longmans, Green and Co. announce the publication of *International Documents, a Collection of Conventions and other international acts of a law-making kind*, by E. A. Whittuck.

Professor Amos S. Hershey, of the Indiana State University, has in press a work upon *the International Law and Diplomacy of the Russo-Japanese War*. The work will be published in January, 1907, by Macmillan and Company.

PERIODICAL LITERATURE OF INTERNATIONAL LAW, 1906

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- Arbitration.* L'Arbitrage. Quelques notes. *Ernest Nys.* Rev. de droit international 2d series, 8:5.
- Arbitration.* De l'influence sur la procédure arbitrage de la cession de droits litigieux. *L. Renault, A de Lapradelle et N. Politis.* gen de droit int. pub. 13:309.
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- Calvo and the Calvo Doctrine.* *Percy Bordwell.* Greenbag, 18:377.
- China.* Extra-territorial jurisdiction in China. *Gustavus Ohlinger.* Mich. Law Rev. 4:339.
- Claims.* Des réclamations diplomatiques. *Henri C. R. Lisboa.* Rev. de droit international, 2d series, 8:237.
- Congo.* L'arrangement anglo-congolois du 9 Mai, 1906. *M. Moncharville.* Rev. gén. de droit int. pub. 13:397.
- Contraband of war, neutral trade in.* *Douglas Owen.* Law Mag. and Rev. 31:51.
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- Macedonia.* L'Intervention de l'Europe dans la question de Macédoine. *A. Rougier.* Rev. gén. de droit int. pub. 13:178.
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- Morocco.* La conférence d'Algéiras et la situation présente de la France au Maroc. *Henri Lorin.* Rev. gén. de droit int. pub. 13:263.
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- Neutral waters.* Die Kohlenversorgung feindlicher Kriegsschiffe in neutralen Gewässern. *Franz Scholz.* Archiv für öffentl. Recht. 20:157.
- Neutrality, forty propositions in the law of.* *Thomas Baty.* Law Mag. and Rev. 31:160.
- Neutral prizes.* La destruction des prises neutres. *Th. Baty.* Rev. Rev. de droit international, 2d series, 8:434.
- Private property, exemption of, from capture at sea in time of war.* *W. R. Kennedy.* Law Mag. and Rev. 32:28.
- Real Union.* Ihr Begriff und die Möglichkeit ihrer Auflösung. *Dr. Blütgen.* Zeitsch. für Völker- und Bundesstaatsrecht, 1:237.

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- Trade-Marks*. La Protection internationale des marques et des dessins ou modèles industriels. *M. B. Frey-Godet*. Zeitsch. für Völker- und Bundesstaatsrecht, 1:329.
- Venezuelan arbitration*. L'Arbitrage Vénézuélien devant la cour de la Haye. *A. Mallarmé*. Rev. gén. de droit int. pub. 13:423.
- War, Arbitration and peace. *W. P. Rogers*. Mich. Law Rev. 4:91.
- War*. Per una codificazione del diritto di guerra: obbligo della dichiarazione. *E. Catellani*. Rivista di diritto internazionale, 1:185.
- War*. Nuovi appunti e discussioni di diritto bellico. A proposito di qualche recente pubblicazione. *S. Gemma*. Rivista di diritto internazionale, 1:319.
- Wireless telegraphy*. La télégraphie sans fil et le droit des gens. *L. Rolland*. Rev. gén. de droit int. pub. 13:58.

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CONTENTS

THE REAL QUESTION UNDER THE JAPANESE TREATY AND THE SAN FRANCISCO SCHOOL BOARD RESOLUTION. Address by the President of the American Society of International Law, <i>Elihu Root</i>	273
THE CONVENTION OF 1907 BETWEEN THE UNITED STATES AND THE DOMINICAN REPUBLIC. <i>Jacob B. Hollander</i>	287
NOTES ON SOVEREIGNTY IN A STATE. <i>Robert Lansing</i>	297
SOME SUGGESTIONS AS TO THE PERMANENT COURT OF ARBITRATION. <i>Jackson H. Ralston</i>	321
INTERNATIONAL ARBITRATION. <i>William L. Penfield</i>	330
A PERMANENT TRIBUNAL OF INTERNATIONAL ARBITRATION: ITS NECESSITY AND VALUE. <i>R. Floyd Clarke</i>	342
THE GENEVA CONVENTION OF 1906. <i>George B. Davis</i>	409
THE DEVELOPMENT OF INTERNATIONAL LAW. <i>Richard Olney</i>	418
BOARD OF EDITORS.....	431
EDITORIAL COMMENT	
The Second Peace Conference of the Hague	431
The Dissolution of the Union of Norway and Sweden	440
The International Status of Korea	444
Japanese Situation	449
The New Immigration Law	452
The New Citizenship Law	458
The Question of Expulsion.....	462
Transit in Extradition Cases	465
Extraterritoriality and the United States Court for China.....	469
Anglo-American Relations	480
Anglo-French Convention Respecting the New Hebrides	482
The Abolition of "Prize Money"	483
Anglo-French-Italian Agreement Regarding Abyssinia.....	484
The Joris Case and the Turkish Capitulations.....	485
Resolutions Adopted by the Institute of International Law, at Ghent, in September, 1906.....	485
Annual Meeting of the American Society of International Law	486
CHRONICLE OF INTERNATIONAL EVENTS. <i>Henry G. Crocker</i>	488
PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW, 1906. <i>Philip De Witt Phair</i>	504
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW.....	511
BOOK REVIEWS: BOOK NOTES.....	544
PERIODICAL LITERATURE OF INTERNATIONAL LAW, 1906	562

SUPPLEMENT—IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER.

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Single copies of the JOURNAL will be supplied by the Publisher at \$1.25 per copy.

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THE REAL QUESTIONS UNDER THE JAPANESE TREATY
AND THE SAN FRANCISCO SCHOOL BOARD
RESOLUTION¹

In opening this meeting of the American Society of International Law, which I hope will be the first of many meetings in unbroken succession to continue long after we personally have ceased to take part in affairs, let me welcome you to the beginning of your labors for a more thorough understanding of this important and fascinating subject. It is impossible that the human mind should be addressed to questions better worth its noblest efforts, offering a greater opportunity for usefulness in the exercise of its powers, or more full of historical and contemporary interest, than in the field of international rights and duties. The change in the theory and practice of government which has marked the century since the establishment of the American Union has shifted the determination of great questions of domestic national policy from a few rulers in each country to the great body of the people, who render the ultimate decision under all modern constitutional governments. Coincident with that change the practice of diplomacy has ceased to be a mystery confined to a few learned men who strive to give effect to the wishes of personal rulers, and has become a representative function answering to the opinions and the will of the multitude of citizens, who themselves create the relations between states and determine the issues of friendship and estrangement, of peace and war. Under the new system there are many dangers from which the old system was free. The rules and customs which the experience of centuries had shown to be essential to the maintenance of peace and good understanding between nations have little weight with the new popular masters of diplomacy; the precedents and agreements of opinion which have carried so great a part of the rights and duties of nations toward each other beyond the pale of discussion are but little understood. The education of

¹ First Annual Meeting of the American Society of International Law. Opening address by the President, Mr. Root.

public opinion, which should lead the sovereign people in each country to understand the definite limitations upon national rights and the full scope and responsibility of national duties, has only just begun. Information, understanding, leadership of opinion in these matters, so vital to wise judgment and right action in international affairs, are much needed. This society may serve as a *collegium*, in the true sense of the word, in which all who choose to seek a broader knowledge of the law that governs the affairs of nations may give each to the other the incitement of earnest and faithful study and may give to the great body of our countrymen a clearer view of their international rights and responsibilities.

I shall detain you from the interesting program of instruction and discussion which has been arranged for this meeting only by trying to illustrate the kind of service that the society may render, in a few remarks intended to clear away a somewhat widespread popular misapprehension regarding a question arising under a treaty of the United States.

The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. * * *

In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation.

The constitution of the state of California provides, in article 9:

SECTION 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.

SEC. 5. The legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

SEC. 6. The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and

technical schools as may be established by the legislature, or by municipal or district authority. The entire revenue derived from the state school fund and from the general state school tax shall be applied exclusively to the support of the primary and grammar schools.

The statutes of California establish the public school system required by the constitution. They provide that the state comptroller must each year

estimate the amount necessary to raise the sum of seven dollars for each census child between the ages of five and seventeen years in the said state of California, which shall be the amount necessary to be raised by *ad valorem* tax for the school purposes during the year.

The statutes further provide that the board of education of San Francisco shall have authority

to establish and enforce all necessary rules and regulations for the government and efficiency of the schools [in that city] and for the carrying into effect the school system; to remedy truancy; and to compel attendance at school of children between the ages of six and fourteen years, who may be found idle in public places during school hours.

The statutes further provide, in section 1662 of the school law:

Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school.

On the 11th of October, 1906, the board of education of San Francisco adopted a resolution in these words:

Resolved: That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the south side of Clay street, between Powell and Mason streets, on and after Monday, October 15, 1906.

The school system thus provided school privileges for all resident children, whether citizen or alien; all resident children were included in the basis for estimating the amount to be raised by taxation for school purposes; the fund for the support of the school was raised by

general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school.

After the passage of this resolution, admission to the ordinary primary schools of San Francisco was denied to Japanese children, and thereupon the government of Japan made representations to the government of the United States that inasmuch as the children of residents who were citizens of all other foreign countries were freely admitted to the schools, the citizens of Japan residing in the United States were, by that exclusion, denied the same privileges, liberties, and rights relating to the right of residence which were accorded to the citizens or subjects of the most favored nation. The questions thus raised were promptly presented by the government of the United States to the federal court in California, and also to the state court of California, in appropriate legal proceedings. The matter has been happily disposed of without proceeding to judgment in either case; but in the meantime there was much excited discussion of the subject in the newspapers and in public meetings and in private conversation.

It is a pleasure to be able to say that never for a moment was there as between the government of the United States and the government of Japan, the slightest departure from perfect good temper, mutual confidence, and kindly consideration; and that no sooner had the views and purposes of the governments of the United States, the state of California, and the city of San Francisco been explained by each to the other than entire harmony and good understanding resulted, with a common desire to exercise the powers vested in each, for the common good of the whole country, of the state, and of the city.

The excitement has now subsided, so that it may be useful to consider what the question really was, not because it is necessary for the purposes of that particular case, but because of its bearing upon cases which may arise in the future under the application of the treaty-

making power of the United States to other matters and in other parts of the national domain.

It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. Was the right to attend the primary schools a right, liberty, or privilege of residence? and, if so, was the limitation of Japanese children to the oriental school and their exclusion from the ordinary schools a deprivation of that right, liberty, or privilege? These questions of construction, and especially the second, are by no means free from doubt; but as they concern only the meaning of a particular clause in a particular treaty they are not of permanent importance, and, the particular occasion for their consideration having passed, they need not now be discussed.

The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the state of California. A correct understanding of that question is of the utmost importance not merely as regards the state of California, but as regards all states and all citizens of the Union.

There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the

citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution.

This will be apparent upon considering the propositions which I will now state:

1. The people of the United States, by the constitution of 1787, vested the whole treaty-making power in the national government. They provided:

The president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. (Art. II, sec. 2.)

No state shall enter into any treaty, alliance or confederation; * * * No state shall, without the consent of congress, * * * enter into any agreement or compact with another state, or with a foreign power. (Art. I, sec. 10.)

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby any thing in the constitution or laws of any state to the contrary notwithstanding. (Art. VI.)

Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every

citizen in every state. Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.

2. Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the constitution; but those implied limitations do not in the slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory.

In the case of *Geofroy v. Riggs*, which, in 1889, sustained the rights of French citizens under the treaty of 1800 to take and hold real and personal property in contravention of the common law and the statutes of the state of Maryland, the supreme court of the United States said:

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. * * * The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration

in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief objects of treaty making, and such provisions always have been reciprocal.

During the entire history of the United States provisions of this description have been included in our treaties of friendship, commerce and navigation with practically all the other nations of the world. Such provisions had been from time immemorial the subject of treaty agreements among the nations of Europe before American independence; and the power to make such provisions was exercised without question by the Continental Congress in the treaties which it made prior to the adoption of our constitution. The treaty of 1778 with France, made between the Most Christian King and the thirteen United States of North America by name, contained such provisions. So did the treaty of 1782 between Their High Mightinesses the States-General of the United Netherlands and the thirteen United States of America by name.

The treaty of 1785 with Prussia, ratified by the Continental Congress on the 17th of May, 1786, contained an exercise of the same kind of power. Mr. Bancroft Davis summarizes the provisions of this character in the Prussian treaty in these words:

The favored nation clause put Russia on the best footing in the ports of Charleston, Boston, Philadelphia and New York, no matter what the legislatures of South Carolina, Massachusetts, Pennsylvania, or New York might say. Aliens were permitted to hold personal property and dispose of it by testament, donation, or otherwise, and the exaction of state dues in excess of those exacted from citizens of the state in like cases were forbidden. The right was secured to aliens to frequent the coasts of each and all the states, and to reside and trade there. Resident aliens were assured against state legislation to prevent the exercise of liberty of conscience and the performance of religious worship; and when dying, they were guaranteed the right of decent burial and undisturbed rest for their bodies.

It is not open to doubt that when the delegates of these thirteen states conferred the power to make treaties upon the new national government in the broadest possible terms and without any words of limitation, the subjects about which they themselves had been making the treaties then in force were included in the power.

The treaty of July 28, 1868, between the United States and China—the celebrated Burlingame treaty—contained, in the sixth article, a

provision in the very words of the Japanese treaty. That article provided:

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.

In the case of *Tiburicio Parrot* (6 Sawyer, 368) the circuit court of the United States said, Mr. Justice Sawyer reading the opinion:

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the Constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain.

And regarding the same treaty the supreme court of the United States remarked, in the case of *Baldwin v. Franks* (120 U. S., 679):

That the United States have power under the constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty we do not doubt.

4. It has been settled for more than a century that the fact that a treaty provision would interfere with or annul the laws of a state as to the aliens concerning whom the provision is made, is no impeachment of the treaty's authority.

The very words of the constitution, that the judges in every state shall be bound by a treaty "any thing in the constitution or laws of any state to the contrary notwithstanding," necessarily imply an expectation that some treaties will be made in contravention of laws of the states. Far from the treaty-making power being limited by state laws, its scope is entirely independent of those laws; and whenever it deals with the same subject, if inconsistent with the law, it annuls the law. This is true as to any laws of the states, whether the

legislative authority under which they are passed is concurrent with that of congress, or exclusive of that of congress.

In the case of *Ware v. Hylton* the supreme court of the United States, in the year 1796, considered the effect under the Constitution of the treaty of peace with England of 1783, which provided that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts, theretofore contracted,

as against a law of the state of Virginia, which confiscated to the state of Virginia the debts due from its citizens to British subjects.

The court said:

There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the supreme law of the land—that is, of all the United States—if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state; and their will alone is to decide. * * *

Four things are apparent on a view of this sixth article of the national constitution: 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. That the constitution or laws of any of the states, so far as either of them shall be found contrary to that treaty, are by force of the said article prostrated before the treaty. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty (or any other), made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.

In the case of *Fairfax v. Hunter*, in 1812, Mr. Justice Story delivering the opinion, the supreme court of the United States sustained the title of a British subject, under the provisions of the treaty of 1794, in direct contravention of the laws of the state of Virginia. In the case of *Chirac v. Chirac*, in 1817, Chief Justice Marshall delivering the

opinion, the supreme court of the United States sustained the title of a French subject to real estate in Maryland, in direct contravention of the laws of that state. A long line of cases have followed in the supreme court applying the provisions of various treaties and maintaining without exception the unvarying rule that the state statute falls before the treaty.

It equally appears from these cases that the treaty provisions which were sustained by the supreme court and the state laws which were declared void, so far as they conflicted with a treaty, related to matters regarding which congress had no power to legislate, but upon which, in the distribution of legislative powers under the constitution, the states, and the states alone, had power to legislate.

5. Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No state can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the president and senate in exercising a power committed to them and prohibited to the states by the constitution.

There was, therefore, no real question of power arising under this Japanese treaty and no question of state rights.

There were, however, questions of policy, questions of national interests and of state interests, arising under the administration of the treaty and regarding the application of its provisions to the conditions existing on the Pacific coast.

In the distribution of powers under our composite system of government the people of San Francisco had three sets of interests committed to three different sets of officers—their special interest as citi-

general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school.

After the passage of this resolution, admission to the ordinary primary schools of San Francisco was denied to Japanese children, and thereupon the government of Japan made representations to the government of the United States that inasmuch as the children of residents who were citizens of all other foreign countries were freely admitted to the schools, the citizens of Japan residing in the United States were, by that exclusion, denied the same privileges, liberties, and rights relating to the right of residence which were accorded to the citizens or subjects of the most favored nation. The questions thus raised were promptly presented by the government of the United States to the federal court in California, and also to the state court of California, in appropriate legal proceedings. The matter has been happily disposed of without proceeding to judgment in either case; but in the meantime there was much excited discussion of the subject in the newspapers and in public meetings and in private conversation.

It is a pleasure to be able to say that never for a moment was there as between the government of the United States and the government of Japan, the slightest departure from perfect good temper, mutual confidence, and kindly consideration; and that no sooner had the views and purposes of the governments of the United States, the state of California, and the city of San Francisco been explained by each to the other than entire harmony and good understanding resulted, with a common desire to exercise the powers vested in each, for the common good of the whole country, of the state, and of the city.

The excitement has now subsided, so that it may be useful to consider what the question really was, not because it is necessary for the purposes of that particular case, but because of its bearing upon cases which may arise in the future under the application of the treaty-

making power of the United States to other matters and in other parts of the national domain.

It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. Was the right to attend the primary schools a right, liberty, or privilege of residence? and, if so, was the limitation of Japanese children to the oriental school and their exclusion from the ordinary schools a deprivation of that right, liberty, or privilege? These questions of construction, and especially the second, are by no means free from doubt; but as they concern only the meaning of a particular clause in a particular treaty they are not of permanent importance, and, the particular occasion for their consideration having passed, they need not now be discussed.

The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the state of California. A correct understanding of that question is of the utmost importance not merely as regards the state of California, but as regards all states and all citizens of the Union.

There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the

citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution.

This will be apparent upon considering the propositions which I will now state:

1. The people of the United States, by the constitution of 1787, vested the whole treaty-making power in the national government. They provided:

The president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. (Art. II, sec. 2.)

No state shall enter into any treaty, alliance or confederation; * * * No state shall, without the consent of congress, * * * enter into any agreement or compact with another state, or with a foreign power. (Art. I, sec. 10.)

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby any thing in the constitution or laws of any state to the contrary notwithstanding. (Art. VI.)

Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every

citizen in every state. Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.

2. Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the constitution; but those implied limitations do not in the slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory.

In the case of *Geofroy v. Riggs*, which, in 1889, sustained the rights of French citizens under the treaty of 1800 to take and hold real and personal property in contravention of the common law and the statutes of the state of Maryland, the supreme court of the United States said:

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. * * * The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration

as it is played in San Domingo won acceptance. In 1882, Ulises Heureaux came to the fore in Dominican politics, and the next seventeen years form the story of his uncontrolled dominance. For a time his creatures were installed in the presidency to preserve a semblance of constitutional form, but throughout he was absolute dictator. Heureaux's rule was not even a benevolent despotism. Brutal cruelty, insatiable greed, moral degeneracy, were the man's personal characteristics, and they shaped his political conduct and his administrative activity. If San Domingo was at peace during Heureaux's time, it was the peace of a merciless terrorism, not the quiet of civil government.

A seeming well-being prevailed, but it was attained by bartering the resources of the country in prodigal concessions, and by discounting the future in reckless debt accumulation. With Heureaux's assassination in 1899 came the deluge and the next five years constitute a climax even in the history of Latin-American politics. Figuereo, Vasquez, Jimenez, Vasquez again, Wossy Gil, and Morales successively occupied the presidential chair, each attaining it by much the same means and holding it by as uncertain tenure. The ordinary crimes of the political decalogue became commonplace. The country was laid waste, the people crushed to hopelessness, the treasury left to stew in utter bankruptcy, and a host of creditors, foreign and domestic, after tightening their hold upon the future became more and more insistent in the present. In January-February, 1905, in face of the imminent likelihood of domestic convulsion and foreign intervention, the protocol of an agreement was concluded between the Dominican Republic and the United States, and this was made effective by a decree of the Dominican executive of March 31, 1905.

The protocol recited in preamble form that the Dominican government was menaced by intervention on the part of nations whose citizens held claims which it was unable to satisfy, and that the republic both desired to reach an agreement with its creditors and to assure for itself the regular receipt of revenues for internal administration, without interruption either by foreign creditors or by political disturbances; moreover that the United States, in compliance with the request of the Dominican government, was disposed to lend its assistance toward effecting a satisfactory settlement with all the creditors.

provision in the very words of the Japanese treaty. That article provided:

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.

In the case of *Tiburicio Parrot* (6 Sawyer, 368) the circuit court of the United States said, Mr. Justice Sawyer reading the opinion:

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the Constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain.

And regarding the same treaty the supreme court of the United States remarked, in the case of *Baldwin v. Franks* (120 U. S., 679):

That the United States have power under the constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty we do not doubt.

4. It has been settled for more than a century that the fact that a treaty provision would interfere with or annul the laws of a state as to the aliens concerning whom the provision is made, is no impeachment of the treaty's authority.

The very words of the constitution, that the judges in every state shall be bound by a treaty "any thing in the constitution or laws of any state to the contrary notwithstanding," necessarily imply an expectation that some treaties will be made in contravention of laws of the states. Far from the treaty-making power being limited by state laws, its scope is entirely independent of those laws; and whenever it deals with the same subject, if inconsistent with the law, it annuls the law. This is true as to any laws of the states, whether the

general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school.

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3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration

the Dominican Republic has requested the United States to give and the United States is willing to give such assistance.

The two governments therefore agree that the president of the United States shall appoint a general receiver of Dominican customs, who with the necessary assistants, likewise appointed, shall collect all the custom duties of the republic until the payment or redemption of the bonds so issued. From the sums so collected, the general receiver, after discharging the expenses of the receivership, shall pay over to the fiscal agent of the loan on the first day of each calendar month, the sum of \$100,000 to be applied to the payment of the interest and the amortization of all the bonds issued. The remainder of the sums collected by the general receiver are to be paid monthly to the Dominican government.

The Dominican government may apply any further sums to the amortization of the bonds, over and above the 1 per cent sinking fund provision stipulated; but in any event, should the customs revenues collected by the general receiver in any year exceed the sum of \$3,000,000, one-half of the surplus above such sum of \$3,000,000 must be applied to the sinking fund for the further redemption of bonds.

The Dominican government agrees to provide by law for the payment of all customs dues to the general receiver and his assistants, and to give them all useful aid and assistance and full protection to the extent of its powers. The government of the United States in turn undertakes to give to the general receiver and his assistants such protection as it may find to be requisite for the performance of their duties.

Provision is also made that until the Dominican Republic has paid the whole amount of the bonds so created there shall be no increase of its public debt except by previous agreement between the Dominican government and the United States, and that the like agreement shall be necessary for any modification of the Dominican import duties, provided that an indispensable condition for the modification of such duties shall be

that the Dominican executive demonstrate and that the president of the United States recognize that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have

been for each of such years in excess of the sum of \$2,000,000 United States gold.

The accounts of the general receiver must be rendered monthly to the *contaduria general* of the Dominican Republic and to the state department for examination and approval by the appropriate officials of the two governments.

The distinctive feature of the new convention as compared with the original agreement is thus, that the United States does not undertake to adjust or determine the Dominican debt, but merely to administer the customs of the republic for the service of a new loan, the proceeds of which are to be devoted to the discharge of all recognized debts and claims, reduced to a basis acceptable both to the republic and the creditors. Even this responsibility is limited to a period of fifty years and may, with the prior amortization of the loan, be terminated at an earlier date. During this period the Dominican Republic is not to increase its public debt nor to modify its import duties save in agreement with the United States.

To the Dominican Republic this extension of the United States' good offices means that debts and claims aggregating some \$32,000,000 will be discharged for about \$17,000,000, that the republic's credit is at once established on a very high plane, that onerous concessions and monopolies are to be redeemed and important works of internal improvement undertaken, that civil quiet and adequate revenues for the maintenance of government are assured, and that imminent danger of foreign intervention is removed—and all this without loss of territorial integrity nor infringement of independent sovereignty.

From whatever point of view regarded, the new convention is a wise, sane and workable solution that pledges the United States to nothing beyond the specific and immediate problem at hand. Once put into operation we shall speedily see a West Indian people who have never had a fair chance, developing into a decent, prosperous peasantry. A country that has been alternately torn in civil anarchy and over-ridden by blood-stained dictatorships, will settle into tranquil and orderly administration, where representative institutions will prevail, at least to the extent possible in Latin-American countries. Public credit will be reestablished, and debts will be discharged to the amount not of their nominal value, but of their equitable worth. Finally,

a serious menace to international peace will be removed, and the traditional policy of the United States will be sanctioned and confirmed.

If, on the other hand, we had refused to do that which we were besought to do, and had continued to pursue a course of opportunism and drift, we should have consigned the government of San Domingo to political and civil chaos; we should have permitted her people to relapse, slowly but surely, into social and moral barbarism, and we should have allowed the land itself to become an international derelict.

JACOB H. HOLLANDER.

NOTES ON SOVEREIGNTY IN A STATE¹

SECOND PAPER

In Part First of these notes the nature of sovereignty was discussed and its manifestations in a single state and a federal state considered. It is now proposed to carry the investigation further, and to see the effect of viewing sovereignty from standpoints internal and external to the state. Having completed this examination, the subjects of *independence*, *civil liberty*, *state liberty*, *constitutions*, and *law* in their relation to sovereignty will be briefly treated.

The sovereignty of a state may be looked at from without and from within; from without, as the independence of a particular state in relation to others * * *; from within, to the legislative power of the body politic. (Bluntschli, p. 501.)

Sovereignty is the supreme power by which a state is governed. The supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in a people of any state, or vested in its ruler by its municipal constitution or fundamental laws. External sovereignty consists in the independence of one political society in respect to all other political societies. (Wheaton: International Law, p. 29.²)

The above quotations are given to show that the subject of this note is not novel; and, although the statements and deductions here made may not accord in detail with these extracts, the general idea will be the

¹Second paper. The following works, referred to by author rather than title are: Bluntschli: Theory of the State, 3d ed. Lawrence: Principles of International Law. Burgess: Political Science and Comparative Constitutional Law, 2 vols. Maine: Early History of Institutions. Lawrence: Principles of International Law. Austin: Principles of Jurisprudence, 5th ed., revised and edited by Robert Campbell, London, 1885.

²We have seen what is meant by a state. If we add to the marks already given in our definition of it, the further mark that the body or individual who receives the habitual obedience of the community does not render the like obedience to any earthly superior, we are at the conception of a *sovereign or independent state*, which possesses not only internal sovereignty, or the power of dealing with domestic affairs, but external sovereignty also, the power of dealing with foreign affairs. (Lawrence, p. 56.)

same. To elaborate this idea in harmony with the theory of the previous notes it may be well to formulate a new statement rather than adopt either of those quoted. Assuming that the Bluntschli assertion is correct, that the sovereignty in a state may be looked at from two points of view, namely, from *within* and from *without* the state, it should be added that, though the actuality of the sovereignty does not change, its precise location may be general or specific according as the point of observation is external or internal. This statement needs further illustration to be entirely clear. To the individuals who are *within* a state the actual location of the sovereignty, both real and artificial, is of the highest importance, for upon its proper exercise depend the character of political institutions and the guaranty of the public and private rights of individuals. To those who are *without* a state, on the other hand, the exact location in a state of the sovereignty is not a matter of concern or inquiry. For all practical purposes in the external relations of a state the established government is accepted as the properly constituted agent of that sovereign.

Viewed from *within*, the sovereign power may be in a small body of individuals, or in a large body of individuals, but never in all the members of a state. Viewed from *without*, it is sufficient that such power is possessed *in* the state and not *outside* of it. From this broader, external point of view a state may be reasonably, as it commonly is, termed "sovereign and independent," though from the narrower, internal point of view it can never be properly so characterized. No matter how often the location of the sovereignty may change within a state, no matter whether the real or the artificial sovereign creates and controls the government, the state in its relation to other states has *somewhere* within itself the possessor of the sovereignty, of which the existing government is presumably the authorized agent. Further than to establish this fact it is unnecessary, and indeed improper, for another state to inquire. These are the conditions which exist in times of domestic peace and in times of foreign war.

When, however, a state of civil war exists, there may be established in a state two distinct governments, each of which claims to be the true and sole agent of the sovereign and is supported in its claim by

numbers of the individuals composing the state, who employ their physical force in its behalf. In these circumstances it becomes necessary for other states to decide which of these rival governments is right in its claim; or, in case such decision is for the time being impossible because the superior physical strength of the real sovereign has not manifested which government it favors, a foreign sovereign or the government of such sovereign may declare its uncertainty by recognizing the *legal* right of the government, which prior to the war represented the sovereign, and the *belligerent* right of the other, which denies the authority of the older government to act for the sovereign, and is attempting by force to disprove such authority. By this course a foreign sovereign or government remains non-committal, neutral, until the real sovereign by exercising superior physical might manifests which of the rival governments is its true agent.

But even under such conditions it is not for those outside of the state to determine *where* in the state the sovereignty is actually located; that is exclusively a domestic question to be decided by the individuals composing the state. So far as foreign sovereigns and governments are concerned (to emphasize what has already been said by repetition) the sovereignty is *within* the state, and the established government is presumptively the properly authorized agent of the possessor of the sovereignty until such government is completely overthrown. For this reason, when a revolution takes place in a state and the real sovereign establishes a new government, the obligations incurred by the former government in its dealings with those outside the state are binding upon the new agent of the sovereign. The revolution from the external point of view is not a change in sovereigns but a change in agents of the sovereign. In the case of the transference of colonial possessions, however, there is an actual change of sovereigns, and the obligations being those of the sovereign follow the original possessor of the colonies.

Sovereignty which thus presents different characteristics, when it is viewed from without or from within the state, has also two corresponding spheres of activity as indicated in the language of Wheaton, quoted at the beginning of this note. One of these spheres embraces all without the state; the other, all within, both political and territorial. It should be borne in mind that the high seas are not within the limits

of any state, and, therefore persons at sea come within the domestic sphere as being a portion of the political state. Judged solely by the exercise of authority, the sovereign of a state may be said to possess two distinct sovereignties. For want of better terms it will be well to adopt those used by Wheaton, and call that sovereignty which deals solely with foreign affairs, *external sovereignty*; and the other, which deals with domestic affairs, *internal sovereignty*. So far as an individual member of a state is concerned the internal type is the *only* sovereignty; and, conversely, to all persons and communities outside of a state, the external type is the only one.

By the accepted practice of the civilized world, each state, or more properly the sovereign of each state, is the equal in the exercise of external sovereignty of every other state or sovereign. As long as there is no primate of nations this assumption arises from the nature of things. The condition of nations in their intercourse with one another is similar to that which would exist among individuals living in an unorganized community, and unrestrained by enforced law. In such a case each person would possess absolute liberty; that is, independence, and would settle all disputes with other persons by physical combat or mutual concessions. No more rude and savage type of human society can be conceived; and yet that is the type which is today illustrated in the community of nations.

Internal sovereignty in modern states, on the other hand, is highly developed. It is exercised in regulating the acts and conserving the civil liberty of individuals within the state, whether such individuals be persons or associations of persons. This sphere of sovereignty will be more fully considered in the notes upon *civil liberty*, *constitutions*, and *law*.

While the political and social relations between national states are of the crude type referred to above, a more fully developed form is to be found in a federal state like that of the United States. Here exists a clearly defined external sovereignty operating over and intervening between the states composing the union. Before entering upon the subject in detail, the following propositions are advanced as being established by the provisions of the federal constitution and historical facts under conditions of domestic peace when the federal principle is in operation:

- (1) The federal sovereign possesses no internal sovereignty except

as to territories and colonies. (2) The federal sovereign alone possesses external sovereignty. (3) All internal sovereignty is possessed by the sovereigns of the states composing the union within their respective political and territorial limits. It is true that there *appears* to be an internal sovereign authority exercised by the federal government, the agent of the federal sovereign, in the fact that it acts directly upon the citizens of the various states, but careful examination of this action and of the relationship of the individual to the federal state will disclose that it is in fact an exercise of external sovereignty.

The independent states, which at the time of the adoption of the United States Constitution formed the federal state, or which were subsequently admitted to it under the provisions of the constitution, by the act of union confided to the federal state all of the external sovereignty of which they were respectively possessed. Not a vestige of such sovereignty remained to the sovereign of any state. If the states had not so completely surrendered this branch of sovereignty, controversies between states of the union could only have been settled by mutual agreement or physical contest, a condition fruitful of discord and disunion. But, having voluntarily and peaceably surrendered their external sovereignty to the federal sovereign, the federal government as agent of that sovereign became the sole arbiter in interstate disputes; provided, that the federal government as such agent possessed the superior physical force to compel obedience, and the opposition to the government was not of such magnitude as to cause an expression of the real sovereignty. No state could actually deprive its sovereign of external sovereignty by any act of surrender unless the recipient of that sovereignty was physically able to maintain its authority; but the superior might of the federal state compared with that of any state of the union is too manifest to require discussion.

Possessing the entire external sovereignty of all the states within the union, the federal sovereign became thereby the *treaty-making power* of all, both between the states of the union and between them and foreign states, the power which in times of international peace is the highest manifestation of external sovereignty. Exercising this power the federal sovereign, acting for each and all of the individual

states, binds all to obey treaty provisions which thus become laws superior to the laws enacted by the respective state sovereigns.

The creation of the federal union of the United States was an act of external sovereignty on the part of each state which took part in the adoption of the constitution; and a subsequent entrance into the union was a similar act by the state admitted. (*N. B. Whenever a state is spoken of as possessing or exercising sovereignty it is to be understood that the sovereign of the state is intended.*) By that act the external sovereignty passed to the federal sovereign, and as all things pertaining to the federal relation between the states belonged to that sphere of sovereignty, the federal sovereign alone possessed the authority to dissolve the union or to allow one or more states to withdraw from it and reassume their external sovereignty. A state, therefore, did not in itself possess the sovereign right to secede from the union, that right was surrendered when it surrendered its external sovereignty to the federal state (we are speaking of a legal rather than an ethical right); but a state did possess the right to doubt whether the federal sovereignty coincided in its exercise with the will of the real sovereign and to test such doubt by an appeal to force; it is the same right of revolution which may, under certain conditions arising in a single state, be justly and morally invoked by individuals.

Since the creation of the federal union was an act of external sovereignty the Constitution of the United States is an instrument in the nature of a treaty between the several states and the amendments to the constitution are of the same nature. There is this difference. In the case of accepting the constitution a state being then in full possession of its external sovereignty acts for itself; but in the case of a constitutional amendment the federal sovereign acts for the state, since by previous acceptance of the constitution the latter divested itself of its external sovereignty confiding it to the federal state.

In the enactment, application and enforcement of the laws of the United States the sovereignty exercised, though apparently internal, is none the less external. Federal laws are regulations which, so far as they apply to individuals, are imposed upon and enforced against them by virtue of the powers granted by the federal constitution and not by virtue of a power inherent in the sovereignty of the federal sovereign. The authority of such laws rests upon that instrument.

They thus become binding by treaty stipulation; and if a federal law is enacted which is without the specific grant it becomes void when such fact is officially declared. The adoption and enforcement of international regulations, whether they apply to states or individuals, is clearly within the scope of external sovereignty, and the possessor of that sovereignty, the federal sovereign, holding that authority, has the legislative, executive and judicial organization for the declaration and enforcement of such regulations throughout the union.

United States colonial possessions being owned by the union are governed under the external sovereignty of the federal state in the same way that two or more sovereigns establish and operate a joint government over a community exterritorial to the states of such sovereigns. The governmental authority, therefore, of such dependencies, whether colonial or protectorate, rests upon those principles which constitute the law of nations, and the operation of the federal constitution in colonies and upon individuals there resident, unless citizens of one of the United States, without a direct federal act giving it force, can hardly be maintained.

A state to possess full nationality must have complete external sovereignty and complete internal sovereignty exclusively within itself, that is, possessed by its sovereign. If it lacks either, it falls short of a perfect national character. A state of the United States, therefore, having transferred to the federal state its external sovereignty, the possessor is no longer within the state and it lacks an essential characteristic of nationality. So, too, the federal state (unless there has been a decisive expression of the real sovereignty) when looked at from the *internal* point of view, is not properly a nation; its character is not national but federal, since it cannot under normal peaceful conditions exercise external sovereignty. Viewed *externally*, however, a state of the union possesses *no* sovereignty, but the federal state possesses *full* sovereignty and *complete* nationality, for so far as foreign states are concerned the external sovereignty is the only authority known or recognized; its possessor, the only sovereign with whom such states have to do; and this authority and this possession, the only evidence of nationality. Whatever then may be the character of the federal state in times of domestic peace, when viewed internally, it is a nation viewed externally.

It is the special duty of the possessor of the internal sovereignty to protect all individuals, whether native or foreign, in the full enjoyment of their civil liberty while they are within the territorial limits of the state. It devolves upon the possessor of the external sovereignty to give aid and protection to the members of the state when they are within the jurisdiction of foreign sovereigns, and to account to such sovereigns for the proper treatment of their nationals while they are within the jurisdiction of the former. When the same person or body of persons possesses both forms of sovereignty and delegates to a single government the exercise of such sovereignty, these duties can be performed consistently and harmoniously; but when the two branches of sovereignty are separated, and the authority is exercised by two distinct agents or governments, there arises an anomalous condition in which the possessor of the external sovereignty is responsible to other sovereigns for the acts of the possessor of the internal sovereignty in relation to the subjects of such sovereigns without having the legal authority to prevent, compel or control these acts.

Each type of sovereignty, the internal and the external, being supreme in its own sphere, there may, or may not, be harmony in the exercise of their respective authorities. But as foreign governments recognize but one sovereignty—and that the external—disagreements between the federal and state governments are to them of no moment. It is apparent that these independent spheres of power and responsibility, arising from the nature of the federal union, cause confusion and present grave difficulties in the administration of the foreign affairs of the United States which have been productive of frequent embarrassment to the federal authorities and furnished just grounds of complaint to the governments of foreign states.

Lawrence in his work on International Law defines *independence* as the right of a state to manage all its affairs, whether external or internal, without interference from other states as long as it respects the corresponding right possessed by each fully-sovereign member of the family of nations. The right of independence is the natural result of sovereignty; it is in fact sovereignty looked at from the point of view of other nations. When a state is entirely its own master, it is sovereign as regards itself, independent as regards others. (Lawrence: International Law, p. 111.)

Here is the same idea which was expressed by Bluntschli and

Wheaton in the quotations with which the preceding note was introduced. If in the above definition the word "sovereign" is substituted for the word "state" it might be accepted with little change. It is the sovereign and not the state that is in reality independent;³ although, since independence is a subject of importance from an external point of view alone, it is not illogical to apply it to the condition of the state itself, for the location of the sovereignty within the state is non-essential to the external observer.

There can be no *actual* independence of a state unless the real sovereignty is held within the state; and no individual or body of individuals can possess that sovereignty without being *actually* independent. The truth of these propositions is so self-evident as to require no demonstration. Just as *superior physical force* is internally an essential quality of real sovereignty, so *independence* is externally an essential quality.⁴ Neither can be separated from such sovereignty without destroying it. Both must exist and be actual. It is only in the case of artificial sovereignty that one can conceive of a sovereign dependent upon or responsible to a higher power. The suggestion that the apparent possessor of the sovereignty in a state is not entirely independent at once raises the query whether the sovereignty possessed is real or artificial? The determination of

³ The notion of sovereignty and independent political society may be expressed concisely thus: If a determinate human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior the other members of society are *subject*; or on that determinate superior, the other members of society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection* or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent*. The party truly independent (independent, that is to say of a determinate human superior), is not the society but the sovereign portion of the society. (Austin, p. 221.)

⁴ These two essentials of real sovereignty, *supreme power* and *independence*, are brought out only very distinctly in a quotation from *The Neutrality of Great Britain During the American Civil War*, by Montague Bernard, which appears in *Maine's International Law*, p. 54. The extract is as follows: "By a sovereign state we mean a community organized under a sovereign government of their own, and by a sover-

whether or not an individual or body of individuals, claiming the real sovereignty, is independent or dependent is conclusive evidence of the rightness of the claim.

Civil liberty or *individual liberty*, as it is often called, differs from independence in that the latter is absolute liberty, and the former is only so much of absolute liberty as can be equally possessed by the individual members of a state. Avoiding comparison, civil liberty may be defined as a condition in which an individual possesses as a legal right the power to act in accordance with his own inclinations within certain limits fixed by the sovereign of the state in which the individual is at the time. In this limited sphere, which must not impinge upon the similar spheres of his fellows, the actions of an individual are unrestrained.

While a man in his natural state may be said to be born with the right of absolute liberty, the fact that he enters the world as a member of society imposes upon him at once the obligation not to infringe upon the equal liberty of other men. Thus the social condition by the operation of nature limits the liberty of the individual from birth, and this natural and unavoidable limitation, like the liberty which it limits, is inherent.⁵ Man's liberty so restricted is a *natural* or an *inherent right*.

Though there may be a *moral* obligation upon the sovereign to grant to every individual in the state the liberty which may be justly claimed as a natural right, the sovereign being the possessor of supreme power cannot be compelled to recognize such obligation and to permit the individual to enjoy such right.⁶ If it is done the act is entirely voluntary on the part of the sovereign. It follows that *civil liberty rests wholly upon the will of the sovereign, and sovereignty is its only source*. This fact arises from the nature of the sovereignty in

eign government we mean a government, however constituted, which exercises the power of making and enforcing laws within a community, and is not itself subject to any superior government. These two factors, the one positive, the other negative, the exercise of power and the absence of superior control, compose the notion of sovereignty and are essential to it."

⁵ Paley thus defines liberty: "To do what we will, is natural liberty; to do what we will, consistently with the interest of the community to which we belong, is civil liberty."

⁶ Political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects. (Austin, p. 274.)

that it is supreme in all the affairs of a state. It is thus stated by Burgess:

The unlimited sovereignty of the state is not hostile to individual liberty, but is its source and support. (Burgess: vol. i, p. 55.)

The proof of this is to be found in comparing the amount of liberty possessed by individuals in different states. For example, in Great Britain a person can act and speak with far more freedom than he can in Russia; he has a freedom of petition which a Turkish subject does not have, and a freedom from judicial oppression, which no Chinaman enjoys.

Actual civil liberty must not be confounded with the right of civil liberty. They may or may not coincide. In any event they are not identical. Whether an individual can *rightfully* demand greater privileges, and what are the *rightful* limitations which a sovereign may fix upon the acts of individuals are ethical and not political questions. The answers do not depend upon a universally accepted moral standard, for no such standard exists, but upon the moral beliefs of the persons who make the answers. Manifestly the ethical idea of civil liberty varies according to the character of the philosopher, and the enlightenment of the epoch and state in which he lives.

Civil liberty, as a voluntary grant by a sovereign, is determined in three ways: *First*, by declaring with what acts of an individual the government, the sovereign's agent, must not interfere; *Second*, by declaring what acts an individual must not perform; *Third*, by declaring from what acts of other individuals the individual must be protected. In states which have governments representative of the real sovereign, the first declaration is commonly embodied in a so-called bill of rights which forms a part of the fundamental law, the constitution; the second and third declarations are, with a few exceptions, made by ordinary legislative enactment.

In illustration of what has been said, the federal constitution of the United States among its first amendments includes a bill of rights, thus, as it were by treaty provision, providing the same limits to civil liberty throughout the federal union. Similar provisions are also inserted in the constitutions of the various states. In this way the sovereignty of the United States in its external character, and the sovereignties of the several states in their internal character unite in fixing the bounds of the civil liberty of an American citizen.

In a union, such as the United States, in which the states are presumptively the units of the federal state, there exists *state liberty*, which is the counterpart of the civil liberty of persons except that it is applied to the states as individuals, and is additional to the civil liberty guaranteed to persons by the federal constitution. State liberty is determined in the same way as civil liberty; that is, by three modes of declaration, except that all the declarations are included in the federal constitution, and are in fact treaty stipulations. Thus, by the constitution the federal government is prohibited from certain acts of preference in regard to any one state; a state is prohibited from performing certain government acts and from interfering with certain acts of the governments of other states.

State liberty stands in the same relation to federal sovereignty that civil liberty stands to sovereignty in a single state. In both cases the *individual member*, whether persons or political communities, are free in their respective spheres, but those spheres may be arbitrarily contracted or expanded by their respective sovereigns. Indeed, a state of a federal union or an individual of a single state may be deprived of all liberty; not that such an act of deprivation would be morally right; it might be, or it might not be, and yet it would be legally right, and entirely within the scope and power of the sovereign.

The consideration of the subject of this note at this place may seem to be premature since it would naturally follow rather than precede the general subject of law; from another point of view, however, the political phase of constitutions might with propriety have been earlier discussed, and particularly so if the views of some writers are adopted. Burgess says:

Not until the state has given itself a definite and regular form of organization; *i. e.*, not until it has formed for itself a constitution, does it become a subject of public law. (Burgess: vol. i, p. 49.)

From this standpoint the subject of constitutions precedes law. They will be considered in this note from their *political* aspect, and the consideration of them in their *legal* aspect will be had in the note upon the general subject of law.

The original Latin signification of the word *constitution* was a law embodied in an imperial edict; that is, a law emanating directly from

the sovereign. It was used in the same sense in England during the Norman period. Later the word came to have a broader meaning, being used to designate *a body of laws*. In modern times the sense is restricted to *the body of the fundamental law of a state*. In spite of these changes the word has retained the idea which it originally possessed, that of law uttered directly by the sovereign. According to the present use, every state, however crude its organization, possesses a constitution, and since it originates with the sovereign it adds a further proof to the assertion that the sovereign is preëxistent to the state.

Although the classification is open to objection, it is convenient to divide constitutions into two general classes; those that are *written*, and those that are *unwritten*. A *written constitution* is a single document furnishing a complete system of government, which is uttered by the sovereign of a single state or by the sovereigns of several states uniting in a federal compact. An *unwritten constitution* is a body of rules or laws, more or less complete, which have from time to time been declared or recognized by the sovereign of a state or the authorized agent of such sovereign, and which relate to the governmental institutions of the state. The written constitution is a product of modern civilization; the unwritten constitution is the natural type which has existed from the beginning of human government.

The distinction made as to written or unwritten is incapable of literal application in every case, and in this lies the chief objection to that classification. For example, the greater portion of the unwritten constitution of England is embodied in enacted laws and is, therefore, written. On the other hand, the provisions of the written constitution of the United States are often extended by implication and are, therefore, not included in terms in the written instrument itself. Custom and usage may also modify to a certain degree a written constitution, but these agencies are of slight importance in affecting such a constitution compared with the influence which they have upon the unwritten type, particularly upon the constitutions of barbarous or semi-civilized states.

All constitutions, irrespective of the class to which they belong, comprehend three distinct subjects; first, *government*; second, *civil liberty*; and, third, *constitutional amendment*. In unwritten constitu-

tious the last subject is always dealt with according to usage and custom and is never embodied in a written declaration. To illustrate: The parliament of Great Britain can change the constitution of the United Kingdom, so far as it deals with the first two subjects, by the passage of an act (eliminating as a legislative factor the obsolete veto-power of the king). Usage and custom have confirmed this mode of amendment. But in the United States, the federal constitution can only be amended in the manner provided by article V of the constitution; and the constitution of each state can be amended only by the method prescribed in such constitution. In fact, in Great Britain the only distinction between a constitutional law and any other law is in the subject-matter of the legislation. If a parliamentary act affects existing governmental forms (as did the act of succession of 1689), public rights (as did the reform bill of 1832), or civil liberty (as did the *habeas corpus* act of 1679), it is amendatory of the British constitution.²

It is apparent that unwritten constitutions, being at all times subject to amendment by the legislative branch of the government, are more readily changed than written constitutions which invariably prescribe a method of constitutional amendment much more difficult than ordinary legislation. Because of this difference, unwritten constitutions may be termed *mobile*, and written constitutions, *fixed*.

The chief advantage of an unwritten constitution is the ease with which it can be changed to meet new conditions. Mobility and therefore adaptability are the features in its favor. The chief disadvantage of such a constitution also arises from its mobile character, for, constantly dependent as to its provisions upon the ability and integrity of the legislative branch of the government, the folly or immorality of that branch may cause unwise or unrighteous amendments, which can only be immediately cured by the exercise of force by the real sovereign, that is, by revolution. If the legislative branch is composed of an elected body of representatives, it is in fact a perennial constitu-

² It is a difficult matter to determine what is constitutional law as distinguished from ordinary statute law, when the enacting body in both cases is the same. * * * But we may assume, I think, that the sovereignty within the constitution, the general principles of liberty, the form and construction of the government, and the character and extent of the suffrage are natural subjects of constitutional law. (Burgess: vol. i, p. 138.)

tional assembly or convention controlled by a simple majority, which from its composition is liable to frequent changes of opinion. The virtues and the evils of the system are manifest.

While in a state possessing a written constitution there is little liability of governmental forms or civil liberty being seriously affected by the personal character of the legislators of the government, difficulties are frequently caused by the fixity of the fundamental law when new and unforeseen conditions arise in the state. In the United States these embarrassments have been in a great measure overcome by a liberal construction of certain provisions of the federal constitution, on the theory that it was the original intention of its framers to provide for every contingency that could possibly arise and that the powers granted by the constitution are sufficient for every condition. The medium, by which this desirable and necessary elasticity has been obtained, is judicial interpretation, so that the danger does not lie in the character of the legislators but in that of the judicial officers which, rightfully or wrongfully, is considered of a higher and more conservative order than that of the average legislative body. By this means the principal advantage of an unwritten constitution, its mobility, is secured without the attendant danger of radical changes by legislators who are dishonest or weak.

It is apparent that in a state with a written constitution the danger of a revolution undertaken for the purpose of changing the fundamental law is far less than in a state with an unwritten constitution. A careful distinction should be made between revolutions of this character and those which have to do merely with changes in the agent of the sovereign; that is, the government. Revolutions of the latter sort may take place without affecting in any way the constitution of the state.

Those who are desirous to examine further into the subject of this note are referred to the unwritten constitutions of the following states: Rome, France prior to the Revolution of 1789, Great Britain and Hungary. The tendency of modern states is toward the adoption of written constitutions. Of this class the constitutions of the following states may be examined to show the type in single states: France as a republic, Chili and Japan. Of the constitutions of composite states

those of the following should be studied: The United States, the Swiss Confederation, the German Empire, and the Confederated Monarchy of Austria-Hungary. The above examples show the various types of governmental systems that have developed under different environments.

A *law* in a state is a rule of human conduct emanating from the sovereign. This is true whether the rule is laid down by the possessor of the real or of the artificial sovereignty, or is declared by the sovereign directly, or indirectly through an agent authorized by the sovereign to make such declaration. In this connection the following statements by Austin and Bluntschli are in point as bearing out this definition.

Laws proper or properly so-called are commands. (Austin, p. 79.)

He defines "positive law" as

law set by political superiors to political inferiors. (Austin, p. 86.)^a

The legislative power is the normal manifestation of the sovereignty of the state. In constitution-making and legislation the sovereignty of the state is in active exercise; otherwise, as a rule, it is in repose. (Bluntschli, p. 509.)

This last quotation is of particular value as stating a truth which applies universally under peaceful conditions, if there is added to the making of laws their interpretation and execution, and if in place of the words "*of the state*" are substituted "*in the state*." It should also be noted that the expressions in the quotation, "constitution-making" and "legislation," both describe processes of *law-making*.

A law, without classification as to its character, may originate in any one of four ways: (1) By direct act of the *real* sovereign. (2) By direct act of the *artificial* sovereign. (3) By formal pronounce-

^a Every positive law, or every law simply and strictly so-called, is set by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign member, to a person or persons in state of subjection to its author. Even though it spring from another fountain or source it is a positive law, or a law strictly so-called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) "the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law." (Austin, p. 177.)

Law, properly, is the word of him that by right hath command over others. (Hobbes: *The Leviathan*, ch. xv.)

ment of a legislature. (4) By tacit acquiescence of the sovereign, either real or artificial.

(1) *By direct act of the real sovereign*

A law which comes into being in this way is fundamental. It is the highest type of legislation. In states which have governments instituted directly by the real sovereign, all written constitutions and all constitutional amendments are composed of such laws. They are usually declared in explicit terms by the sovereign, but in certain circumstances they may arise from the exercise of the superior force of the sovereign. In the latter case the act of the sovereign is usually supplemented by a formal declaration, but it is not always done. Questions of conduct, which the sovereign decides by the exercise of physical strength, are of such magnitude as to affect political or social institutions that are interwoven with the very fabric of the state, and to cause civil strife. It is in this strife that the will of the real sovereign is manifested by the exhibition of superior might.

An example of this method of expressing the real sovereignty is to be found in the American civil war. In that conflict the real sovereign of the union decided by force of arms two questions, the one political, the other social. The political question was whether a state could at will secede from the federal state and reassume its external sovereignty. The social question was whether slaves could be held within the territorial limits of the United States. Both of these questions were answered in the negative by the real sovereign. The denial of voluntary secession was never formally proclaimed, but the maintenance of the territorial integrity of the union by superior physical strength operated as an emphatic expression of the sovereign will, a law in fact, if not in conventional form, which forbade a state to secede from the federal state. On the other hand, the institution of slavery, though actually abolished by the governmental agent of the real sovereign, was subsequently in formal manner abolished by constitutional amendment enacted in due form by the federal sovereign.

Thus, whether expressed by the exercise of physical force or embodied in a formal declaration, a rule of conduct emanating directly from the real sovereign is a law, which is of special dignity because of

its immediate source, and because it is unquestionably the expression of the sovereign will.

(2) *By direct act of the artificial sovereign*

Laws of this class can only originate in states having monarchic governments of pronounced autocratic form, or in states where formerly such unlimited monarchies existed but which have since introduced democratic institutions without changing the general monarchic form of the government. These laws are not confined to those that are fundamental, as those of the preceding class, but embrace legislation of all types. They include royal decrees, proclamations, and every other form of command and prohibition issuing directly from the artificial sovereign which by reason of the governmental organization can be enforced by that sovereign. The decrees of the ancient empires of Assyria and Babylon and Persia, the imperial edicts of the Roman emperor, the royal charters of England, and the ordinances of the kings of France, belonged to this class of laws. Modern examples are to be found in Turkish firmans, Russian ukases, the edicts of the Chinese emperor, the decrees and executive orders of the dictator-presidents of certain Latin-American republics, and, among states without written constitutions, in the proclamations putting into effect treaty provisions, such as the English "orders in council." In form, a proclamation by the president of the United States belongs to this category, but being an executive power delegated by the constitution it is in reality a legislative act authorized by the federal sovereign. Martial law comes under this head unless enforced by a legally constituted representative of the real sovereign in accordance with the demonstrated will of such sovereign.

There are also laws of a different character which originate in this way. They are those that arise from the declaration of the artificial sovereign acting in a judicial capacity. Austin says that the sovereign's "direct and proper purpose is not the establishment of a rule, but the decision of the specific case;" and that "he legislates *as properly judging* and not *as properly legislating*." Examples of such laws are the decrees of the Roman emperors, and the decisions of a monarch acting as a supreme judge, a general and frequent exercise of sovereign authority before the development of modern governments and the

separation of the executive, legislative and judicial branches. The continued application of the rules thus declared, however, when applied by judicial officers other than the artificial sovereign, fall under that category of laws mentioned in the fourth method of origination.

(3) *By formal pronouncement of a legislature*

Laws of this class are always written and always formally promulgated in accordance with the governmental system of the state, provided such system has a distinct legislative agent designated by the sovereign, either real or artificial. With these laws, which are commonly known as *statutes*, are included all proclamations and orders issuing from the executive department of the government, when the authority for this limited form of legislation is given by the constitution of the state.

As the real sovereign does not directly enact laws of this character, except in states with pure democratic governments or in those where the *initiation* or *referendum* are employed, but delegates the authority to a legislative agent, such laws in states with written constitutions lack the characteristics of fundamental law. However, in states with unwritten constitutions laws of this class relating to constitutional subjects are deemed to be amendatory of the fundamental law, though liable at all times to be annulled by the real sovereign or to be repealed or modified by the legislative agent.

The instability of statutory law is manifest considering how frequently legislative representatives change and how continually popular opinion in states with liberal institutions varies under the influence of new conditions and the development of social, religious, ethical and political thought. While certain laws, rooted in principles of simple justice, in long established ideas of right, or in racial traits, remain constant, the great mass of statutory law is constantly fluctuating, expanding by new legislation and amendment or contracting by amendment and repeal, to meet more perfectly the needs of society or the ideas that have become dominant.

(4) *By tacit acquiescence of the sovereign*

Laws of this type include those that spring from custom, usage, and principles of natural justice. In states deriving their jurispru-

dence from Rome customary law forms an important part of the general law, while in England and the United States laws of this character are embodied in the common law. The force of all such laws is based upon the tacit acquiescence of the sovereign in their application by the courts. "*Quinon improbat, approbat*" (3 Coke's Institutes, 27), is the maxim which is applied. Sir Henry Maine says:

The laws with which a student of jurisprudence is concerned in our own day are undoubtedly either the actual commands of sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula "a law is a command" by help of the formula "Whatever a sovereign permits, is his command." (Maine, p. 374.)

It is clear that all such laws grow in authority the longer and the more frequently they are applied, and that, through their announcement in judicial decisions, they obtain the characteristics of written laws, namely, positiveness and exactness. The importance of precedent as a means of giving stability to laws of this character is apparent.

While the Roman law rests largely upon the authority of early writers who declared the legal principles practiced in ancient times and which were accepted as customary, the common law finds its chief source in the declarations of courts, which applied principles of natural justice to all cases which were not affected by enacted laws. It is true that the courts assumed that these principles had been announced in lost statutes or had become established by custom and usage, and that they were, therefore, legally binding having received the positive or tacit approval of the sovereign. But this assumption rests upon no evidence, except in a few cases, as when, for example, the sovereign as a judge declared the law; it is purely a legal fiction. If it could have been established, the common law in its inception would have rested upon a higher authority than it in fact does. A statute is the express will of the sovereign declared by himself or an authorized agent. A custom, which has attained to the force of a law, has received the *actual* acquiescence of the sovereign. But a principle of natural justice acquires its legal force from an *implied* acquiescence of the sovereign, unless announced by the sovereign acting in a judicial capacity. The fact that the application of such a principle

is declared to be an "immemorial custom" or "according to immemorial usage," in no way affects the nature of the acquiescence of the sovereign. In the great bulk of cases the appropriate law is set forth in previous judicial decisions; but, as there must have been in every instance a *first* decision, the law announced therein must have been an application of the principles of natural justice, which being declared by judicial authority are termed by Austin "judiciary law" or "judge-made law."⁹

Justice in the abstract as applied to human affairs, or *natural justice*, as it may be called to distinguish it from *legal justice* (i. e., the application of the laws of a state), is the desire and intent to render to every person that to which such person is entitled. Touillier makes the distinction between virtue and justice

that that which is considered positively and in itself is called virtue, when considered relatively and with respect to others has the name of justice. (Droit Civ., Pr., tit. prélim., n. 7.)

In a word, virtue is righteousness applied to self; justice, righteousness applied to others. Burke said that

justice is the great standing policy of civil society.

In accordance with this truth it is assumed that a sovereign wills to be preëminently just, and that in controversies, to which enacted law does not apply, it is the sovereign will that principles of natural justice shall be applied. "*Legibus sumptis disinentibus, lege naturali intendum est.*" On this assumption such principles, though often modified by enacted law, are accepted as the will of the sovereign and as such are subject to judicial interpretation, declaration and application.

It is apparent that, as natural justice is unlimited in its scope, the common law, either declared or undeclared, is applicable to all possible

⁹ The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.

* * * A great proportion of the rules and maxims which constitute the immense code of the common law goes into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases. (Kent: Commentaries, 2d Am. ed., p. 471.)

tions the last subject is always dealt with according to usage and custom and is never embodied in a written declaration. To illustrate: The parliament of Great Britain can change the constitution of the United Kingdom, so far as it deals with the first two subjects, by the passage of an act (eliminating as a legislative factor the obsolete veto-power of the king). Usage and custom have confirmed this mode of amendment. But in the United States, the federal constitution can only be amended in the manner provided by article V of the constitution; and the constitution of each state can be amended only by the method prescribed in such constitution. In fact, in Great Britain the only distinction between a constitutional law and any other law is in the subject-matter of the legislation. If a parliamentary act affects existing governmental forms (as did the act of succession of 1689), public rights (as did the reform bill of 1832), or civil liberty (as did the *habeas corpus* act of 1679), it is amendatory of the British constitution.⁷

It is apparent that unwritten constitutions, being at all times subject to amendment by the legislative branch of the government, are more readily changed than written constitutions which invariably prescribe a method of constitutional amendment much more difficult than ordinary legislation. Because of this difference, unwritten constitutions may be termed *mobile*, and written constitutions, *fixed*.

The chief advantage of an unwritten constitution is the ease with which it can be changed to meet new conditions. Mobility and therefore adaptability are the features in its favor. The chief disadvantage of such a constitution also arises from its mobile character, for, constantly dependent as to its provisions upon the ability and integrity of the legislative branch of the government, the folly or immorality of that branch may cause unwise or unrighteous amendments, which can only be immediately cured by the exercise of force by the real sovereign, that is, by revolution. If the legislative branch is composed of an elected body of representatives, it is in fact a perennial constitu-

⁷ It is a difficult matter to determine what is constitutional law as distinguished from ordinary statute law, when the enacting body in both cases is the same. * * * But we may assume, I, think, that the sovereignty within the constitution, the general principles of liberty, the form and construction of the government, and the character and extent of the suffrage are natural subjects of constitutional law. (Burgess: vol. i, p. 138.)

tional assembly or convention controlled by a simple majority, which from its composition is liable to frequent changes of opinion. The virtues and the evils of the system are manifest.

While in a state possessing a written constitution there is little liability of governmental forms or civil liberty being seriously affected by the personal character of the legislators of the government, difficulties are frequently caused by the fixity of the fundamental law when new and unforeseen conditions arise in the state. In the United States these embarrassments have been in a great measure overcome by a liberal construction of certain provisions of the federal constitution, on the theory that it was the original intention of its framers to provide for every contingency that could possibly arise and that the powers granted by the constitution are sufficient for every condition. The medium, by which this desirable and necessary elasticity has been obtained, is judicial interpretation, so that the danger does not lie in the character of the legislators but in that of the judicial officers which, rightfully or wrongfully, is considered of a higher and more conservative order than that of the average legislative body. By this means the principal advantage of an unwritten constitution, its mobility, is secured without the attendant danger of radical changes by legislators who are dishonest or weak.

It is apparent that in a state with a written constitution the danger of a revolution undertaken for the purpose of changing the fundamental law is far less than in a state with an unwritten constitution. A careful distinction should be made between revolutions of this character and those which have to do merely with changes in the agent of the sovereign; that is, the government. Revolutions of the latter sort may take place without affecting in any way the constitution of the state.

Those who are desirous to examine further into the subject of this note are referred to the unwritten constitutions of the following states: Rome, France prior to the Revolution of 1789, Great Britain and Hungary. The tendency of modern states is toward the adoption of written constitutions. Of this class the constitutions of the following states may be examined to show the type in single states: France as a republic, Chili and Japan. Of the constitutions of composite states

those of the following should be studied: The United States, the Swiss Confederation, the German Empire, and the Confederated Monarchy of Austria-Hungary. The above examples show the various types of governmental systems that have developed under different environments.

A *law* in a state is a rule of human conduct emanating from the sovereign. This is true whether the rule is laid down by the possessor of the real or of the artificial sovereignty, or is declared by the sovereign directly, or indirectly through an agent authorized by the sovereign to make such declaration. In this connection the following statements by Austin and Bluntschli are in point as bearing out this definition.

Laws proper or properly so-called are commands. (Austin, p. 79.)

He defines "positive law" as

law set by political superiors to political inferiors. (Austin, p. 86.)*

The legislative power is the normal manifestation of the sovereignty of the state. In constitution-making and legislation the sovereignty of the state is in active exercise; otherwise, as a rule, it is in repose. (Bluntschli, p. 509.)

This last quotation is of particular value as stating a truth which applies universally under peaceful conditions, if there is added to the making of laws their interpretation and execution, and if in place of the words "*of the state*" are substituted "*in the state*." It should also be noted that the expressions in the quotation, "constitution-making" and "legislation," both describe processes of *law-making*.

A law, without classification as to its character, may originate in any one of four ways: (1) By direct act of the *real* sovereign. (2) By direct act of the *artificial* sovereign. (3) By formal pronounce-

* Every positive law, or every law simply and strictly so-called, is set by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign member, to a person or persons in state of subjection to its author. Even though it spring from another fountain or source it is a positive law, or a law strictly so-called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) "the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law." (Austin, p. 177.)

Law, properly, is the word of him that by right hath command over others. (Hobbes: The Leviathan, ch. xv.)

ment of a legislature. (4) By tacit acquiescence of the sovereign, either real or artificial.

(1) *By direct act of the real sovereign*

A law which comes into being in this way is fundamental. It is the highest type of legislation. In states which have governments instituted directly by the real sovereign, all written constitutions and all constitutional amendments are composed of such laws. They are usually declared in explicit terms by the sovereign, but in certain circumstances they may arise from the exercise of the superior force of the sovereign. In the latter case the act of the sovereign is usually supplemented by a formal declaration, but it is not always done. Questions of conduct, which the sovereign decides by the exercise of physical strength, are of such magnitude as to affect political or social institutions that are interwoven with the very fabric of the state, and to cause civil strife. It is in this strife that the will of the real sovereign is manifested by the exhibition of superior might.

An example of this method of expressing the real sovereignty is to be found in the American civil war. In that conflict the real sovereign of the union decided by force of arms two questions, the one political, the other social. The political question was whether a state could at will secede from the federal state and reassume its external sovereignty. The social question was whether slaves could be held within the territorial limits of the United States. Both of these questions were answered in the negative by the real sovereign. The denial of voluntary secession was never formally proclaimed, but the maintenance of the territorial integrity of the union by superior physical strength operated as an emphatic expression of the sovereign will, a law in fact, if not in conventional form, which forbade a state to secede from the federal state. On the other hand, the institution of slavery, though actually abolished by the governmental agent of the real sovereign, was subsequently in formal manner abolished by constitutional amendment enacted in due form by the federal sovereign.

Thus, whether expressed by the exercise of physical force or embodied in a formal declaration, a rule of conduct emanating directly from the real sovereign is a law, which is of special dignity because of

its immediate source, and because it is unquestionably the expression of the sovereign will.

(2) *By direct act of the artificial sovereign*

Laws of this class can only originate in states having monarchic governments of pronounced autocratic form, or in states where formerly such unlimited monarchies existed but which have since introduced democratic institutions without changing the general monarchic form of the government. These laws are not confined to those that are fundamental, as those of the preceding class, but embrace legislation of all types. They include royal decrees, proclamations, and every other form of command and prohibition issuing directly from the artificial sovereign which by reason of the governmental organization can be enforced by that sovereign. The decrees of the ancient empires of Assyria and Babylon and Persia, the imperial edicts of the Roman emperor, the royal charters of England, and the ordinances of the kings of France, belonged to this class of laws. Modern examples are to be found in Turkish firmens, Russian ukases, the edicts of the Chinese emperor, the decrees and executive orders of the dictator-presidents of certain Latin-American republics, and, among states without written constitutions, in the proclamations putting into effect treaty provisions, such as the English "orders in council." In form, a proclamation by the president of the United States belongs to this category, but being an executive power delegated by the constitution it is in reality a legislative act authorized by the federal sovereign. Martial law comes under this head unless enforced by a legally constituted representative of the real sovereign in accordance with the demonstrated will of such sovereign.

There are also laws of a different character which originate in this way. They are those that arise from the declaration of the artificial sovereign acting in a judicial capacity. Austin says that the sovereign's "direct and proper purpose is not the establishment of a rule, but the decision of the specific case;" and that "he legislates *as properly judging* and not *as properly legislating*." Examples of such laws are the decrees of the Roman emperors, and the decisions of a monarch acting as a supreme judge, a general and frequent exercise of sovereign authority before the development of modern governments and the

separation of the executive, legislative and judicial branches. The continued application of the rules thus declared, however, when applied by judicial officers other than the artificial sovereign, fall under that category of laws mentioned in the fourth method of origination.

(3) *By formal pronouncement of a legislature*

Laws of this class are always written and always formally promulgated in accordance with the governmental system of the state, provided such system has a distinct legislative agent designated by the sovereign, either real or artificial. With these laws, which are commonly known as *statutes*, are included all proclamations and orders issuing from the executive department of the government, when the authority for this limited form of legislation is given by the constitution of the state.

As the real sovereign does not directly enact laws of this character, except in states with pure democratic governments or in those where the *initiation* or *referendum* are employed, but delegates the authority to a legislative agent, such laws in states with written constitutions lack the characteristics of fundamental law. However, in states with unwritten constitutions laws of this class relating to constitutional subjects are deemed to be amendatory of the fundamental law, though liable at all times to be annulled by the real sovereign or to be repealed or modified by the legislative agent.

The instability of statutory law is manifest considering how frequently legislative representatives change and how continually popular opinion in states with liberal institutions varies under the influence of new conditions and the development of social, religious, ethical and political thought. While certain laws, rooted in principles of simple justice, in long established ideas of right, or in racial traits, remain constant, the great mass of statutory law is constantly fluctuating, expanding by new legislation and amendment or contracting by amendment and repeal, to meet more perfectly the needs of society or the ideas that have become dominant.

(4) *By tacit acquiescence of the sovereign*

Laws of this type include those that spring from custom, usage, and principles of natural justice. In states deriving their jurispru-

dence from Rome customary law forms an important part of the general law, while in England and the United States laws of this character are embodied in the common law. The force of all such laws is based upon the tacit acquiescence of the sovereign in their application by the courts. "*Quinon improbat, approbat*" (3 Coke's Institutes, 27), is the maxim which is applied. Sir Henry Maine says:

The laws with which a student of jurisprudence is concerned in our own day are undoubtedly either the actual commands of sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula "a law is a command" by help of the formula "Whatever a sovereign permits, is his command." (Maine, p. 374.)

It is clear that all such laws grow in authority the longer and the more frequently they are applied, and that, through their announcement in judicial decisions, they obtain the characteristics of written laws, namely, positiveness and exactness. The importance of precedent as a means of giving stability to laws of this character is apparent.

While the Roman law rests largely upon the authority of early writers who declared the legal principles practiced in ancient times and which were accepted as customary, the common law finds its chief source in the declarations of courts, which applied principles of natural justice to all cases which were not affected by enacted laws. It is true that the courts assumed that these principles had been announced in lost statutes or had become established by custom and usage, and that they were, therefore, legally binding having received the positive or tacit approval of the sovereign. But this assumption rests upon no evidence, except in a few cases, as when, for example, the sovereign as a judge declared the law; it is purely a legal fiction. If it could have been established, the common law in its inception would have rested upon a higher authority than it in fact does. A statute is the express will of the sovereign declared by himself or an authorized agent. A custom, which has attained to the force of a law, has received the *actual* acquiescence of the sovereign. But a principle of natural justice acquires its legal force from an *implied* acquiescence of the sovereign, unless announced by the sovereign acting in a judicial capacity. The fact that the application of such a principle

is declared to be an "immemorial custom" or "according to immemorial usage," in no way affects the nature of the acquiescence of the sovereign. In the great bulk of cases the appropriate law is set forth in previous judicial decisions; but, as there must have been in every instance a *first* decision, the law announced therein must have been an application of the principles of natural justice, which being declared by judicial authority are termed by Austin "judiciary law" or "judge-made law."⁹

Justice in the abstract as applied to human affairs, or *natural justice*, as it may be called to distinguish it from *legal justice* (i. e., the application of the laws of a state), is the desire and intent to render to every person that to which such person is entitled. Touillier makes the distinction between virtue and justice

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social relations between man and man, and to all possible relations between government and society. This fact gives rise to the maxim, "*Lex semper dabit remedium.*" But, though the common law is ethically superior and more truly in accord with the dignity of a sovereign, enacted constitutional law and statutory law supersede it whenever these come in conflict with it. The reason is evident. The two classes of laws are the express will of the sovereign while the common law, as has been said, rests on *implied* acquiescence.

Disapproval of non-fundamental laws (including in that category statutory and judicial laws and such customary laws as do not relate to constitutional subjects) may be shown by the real sovereign in one of two ways; *first*, by direct legislative act in adopting a nullifying constitutional amendment or in negating them through the medium of the *referendum*; or, *second*, by physically resisting all attempts to enforce such laws. If the latter method is employed, the resistance must not only be successful, but substantially universal and perpetual, leaving no reasonable doubt but that the forceful manifestation of disapproval represents the collective will of the body of individuals in the state possessing the real sovereignty. If it falls short of this certainty, the resistance fails to be an expression of the will of the real sovereign, and the law retains its full force and validity. The mere act of resisting is not sufficient, that may be simply the crime of an individual, a riot, or an insurrection, according to the magnitude of the opposition and the degree of force used. *Resistance that is absolutely and generally successful* is essential to make resistance to law a disapproving act of the real sovereign.

Since the real sovereignty resides among the collection of individuals composing the political state, though its actual location in that body may not be determined and may constantly vary as to the individuals who possess it, and since the laws limit and control the conduct of *all* the individuals in a state irrespective of the location of the sovereignty, it follows that the individuals composing a state are *collectively* the repository of the supreme governing power, and that they are *separately* the governed. The declaration, therefore, that all government rightly constituted must be founded upon the "consent of the governed"—a declaration of great potency in shaping political events during the eighteenth century—is to this extent true. But since the

possessors of the sovereignty never include *all* the members of the state, the assertion is never correct.¹⁰

What has been said of a *rightfully* established government in its relation to the consent of the governed applies with equal force to the laws emanating from or enforced by such government. The sole purpose of all government in a state is to declare and carry out the will of the sovereign. If it fails to do this, it loses its true character as the agent of the sovereign. Laws are the expressions of the sovereign will. To make, interpret, apply and execute them is the duty of government. Therefore, if a *rightfully* established government rests upon the consent of the governed, its acts, the laws, receive a like sanction. It should, however, be specially noted that it is only *right* characted government and *right* characted laws to which this maxim applies, for it is an historical fact that there have always existed governments and laws which do not conform to it and which are decidedly hostile to its spirit. They are undoubtedly constituted in *legal* right, though not in *ethical* right. The use of the word *rightfully* here is in an ethical sense, and not in a legal or political one. Nevertheless the institutional growth toward liberalism and the moral influence of modern thought are making the application of this ethical maxim of government more and more general throughout the world. But the movement is based upon intellectual influences rather than upon sovereign power.

Natural justice—to repeat the definition already given—is the desire and intent to render to every person that to which such person is entitled. When applied without limitation or modification, such justice becomes the interpretation and enforcement of moral principles. But in the more restricted sense, which justice obtains when used in connection with the laws in a state, it supplants morality with legality and interprets and enforces legal rather than moral principles. This is the type of justice already designated as *legal justice*. It is apparent without demonstration that the two types are not synonymous; one is unlimited; the other, limited; one is applied morality; the other, applied law; and morality and law are by no means the same thing.

¹⁰ What may be styled "*collective consent*" is brought out by Austin in the following statement: Every government has arisen through the consent of the people or the bulk of the natural society from which the political was formed. For the bulk of the natural society from which a political is formed, submit *freely* or *voluntarily* to the inchoate political government. (Austin, p. 298.)

Emanating as law does from a sovereign or from the agent of a sovereign, who being human is morally imperfect, law is not necessarily either moral or right, though it must be obeyed so long as its author possesses the power to compel obedience. Even when a sovereign attempts to make laws conform to morality, he may fail to do so in the judgment of the rest of the world, for the moral standards of sovereigns may differ to such a degree that the principles expressed in their respective legal codes may be entirely contradictory of one another. To illustrate the different conceptions of what is and what is not moral, it is only necessary to compare the ethical codes of the Israelites, of the Mahometan world, of Puritan England, of France during the Terror, of the civilized and barbarous races of to-day. The obvious and inevitable conclusion is that, though there can exist but one *perfect* ethical standard in the world, moral law as known and accepted by various peoples, like the laws which are enacted by them, is imperfect and affected by the intelligence, the education and the mental environment of each individual or body of individuals that attempts to follow its precepts or to incorporate them in political legislation.

Thus the principles of natural justice are not a fixed quantity, an inflexible standard, throughout the world, and never will be until all nations come to one mind as to what is righteous in human conduct, both positively and relatively, and adopt a universal, unchangeable and identical code of morals.

ROBERT LANSING.

SOME SUGGESTIONS AS TO THE PERMANENT COURT OF ARBITRATION

Through the Hague convention of 1899, for the first time by a general treaty, nations in effect agreed that under certain circumstances, at least, they were morally bound, as were ordinary corporations or mere private individuals, to submit the merits of their disputes to impartial examination. The old doctrine that the king, as the representative of Deity, could do no wrong and the newer fiction that national governments were sovereign—beyond the ordinary gauges of right and wrong—and were their own courts of last resort upon the rightfulness of their actions toward other governments, subject only to the arbitrament of war, were measurably impaired, the signatory nations admitting fallibility and agreeing that, composed as they were of an aggregate of individuals, like their component parts they might err, and that the question as to whether they had erred or not could fairly be determined by other human beings, perhaps no wiser, but certainly more impartial than themselves.

It was not to be expected that this court, created for the first time by general action and against the more than silent protest of at least one of the contributing nations, should be perfect, either as to its jurisdiction or as to its composition. It is the history of all governmental institutions that as they "find themselves," their functions grow in extent and logical completeness. Always in this, as in other matters, it is "*le premier pas qui coûte*." The important first step having been taken, however, we may expect the future will afford an adequate solution of the jurisdictional questions timidly and inadequately suggested by the convention of 1899. It is the province of the present article not to deal with questions of jurisdiction, but to discuss certain matters of formation and procedure, which properly studied will most certainly tend to insure the impartiality and high standard of the court, and, in so doing, assure its usefulness, ultimately adding to its functions and renown.

The convention of 1899 provided that the constituent nations should each have the right to select four members of this court at the most, to serve for six years, with power of renewal, and that when the services of the court were sought, each party should, in the absence of other special agreement, appoint two arbitrators, these together to choose an umpire, or, in case of equal voting, the choice of the umpire to be entrusted to a third power, selected by agreement between the contestants, while the differing nations were to pay their own expenses and an equal share of those of the tribunal.

In the first case brought before the court—that of the Pious Fund—the United States selected two arbitrators and Mexico a like number, the four determining upon the umpire; in the second—that of the Japanese House Tax—the two sides selected each an arbitrator and they together asked the king of Sweden and Norway to name an umpire; in the third—that of the Venezuelan Preferential Question—the emperor of Russia was asked to name the three arbitrators; and in the fourth—that of the Mascate Dispute—the several parties named an arbitrator and the two chose the umpire, and had they failed to agree within a month from the date of their appointment the king of Italy was authorized to name him.

In opening our examination, let us consider first the method of appointment of the whole banc of judges, their proper personnel, and compensation.

If the general complexion of the Hague court is to be criticised, it would be because its members are too largely under the control, and too likely to represent the official views of the appointing government. In very many instances, it has named upon the court one or more of its own officials, often its regular legal or diplomatic advisers, their relations to their constituent governments remaining unchanged. It is to be remarked that these gentlemen, illustrious as they are and unbiased as they would wish to be, are in danger of being under unconscious restraint or prepossession. It would seem quite enough, although unavoidable, that judges of this eminent court, by their education and surroundings, should be predisposed in favor of autocratic, monarchic or republican forms of government and imbued with their respective traditions. Indefinitely and unavoidably are the difficulties of their position increased when they remain a part of the governing body of their respective countries, their views colored by official sta-

tion or employment and their minds obsessed by controlling governmental ideas of national polity and expediency.

To illustrate the situation, we may readily believe a South American republic would more willingly accept, as well-founded and just, conclusions reached by a German of acknowledged capacity, free from official entanglement, than it would accept the judgment even of the same man dominated by the ideas, temporary or permanent, of his own government relative to theories of international law or of national advantage. In saying this, we have to bear in mind that even American secretaries of state have from time to time, impelled by overpowering political considerations, departed in their pronouncements from the teachings of international law, and we may recognize the fact that representatives of other nations may likewise err.

And this consideration applies, at least so far as continental Europe is concerned, to judges of its courts, for we will not forget that in European countries, as a rule, there is not the fairly clear division of governmental functions that obtains in the United States and Great Britain. Upon the continent, a judge is generally to be considered as part of the executive branch of the government. He enters upon his judicial career in his youth, substantially as he might enter the civil or military service, expecting advancement from the executive and susceptible to its influence. This feeling becomes inbred, even if subconscious, and its existence justifies forbidding a national judge appointed to the Hague court from retaining his former position quite as much as it would forbid a diplomatic or other executive officer from continuing in such employment. This branch of our argument, so far as it refers to judicial officers, at least, has little force with reference to the appointment of American members of the court, but we cannot claim exception from a rule worthy of general adoption. If we care, therefore, to have the Hague court in the highest degree an independent body, let us hope that the next Hague conference may decide that the judges hereafter appointed shall, by virtue of their appointment, vacate any purely national position they may be holding.

And this leads us a step further. These judges, while from the necessities of the case named by individual governments, should regard themselves, so far as such a thing may be, not as citizens or subjects of the countries of their birth or adoption, but as citizens of the world and divorced from all possible or at least probable chance of preferment

in their own lands. To this end, their appointment should be for life and their salary sufficient in amount to relieve them from every ambition save that of serving the world in the most distinguished manner.

The appointment of a permanent salaried international judiciary such as we are now contemplating would add immensely to the importance, dignity and labors of the Hague court. There are today questions of grave international moment pending between nations and deserving the consideration of such a tribunal, which may not be referred to it because of the expense as compared with the pecuniary amount involved. We have in mind certain cases involving differences as to what constitutes contraband of war, affecting but a few thousand dollars, whose present reference to the Hague court is practically inhibited because the judicial and other fees would probably exceed for each party the amount in controversy. It needs no argument to prove that with increased facility of reference to the Hague court, increased reference will come, and that the habit of referring disputes to judicial determination is like any other habit, good or bad, and will grow with its exercise, until more and more men will appreciate the fact that the few thousand dollars spent for judges pays for itself vastly better than the continued existence of unsettled disputes likely to lead to embittered discussions or worse. Should we not, then, provide that each country shall furnish at least one judge for the court and shall at all times appropriate an amount of money sufficient to pay the number of judges it shall supply, not less than one, together with its proportion of the incidental expenses of the conduct of the court?

If the foregoing suggestions should receive favorable consideration, certain other reforms would flow from them, even without express action. The Hague convention does not in terms provide, although the matter was discussed before the conference and decided opinions expressed, that no member of the Hague court should be allowed to practice before it. In the trial of the Pious Fund Case, the principal counsel for Mexico was a Belgian member of the court. One of the speeches made on behalf of the United States was delivered by another Belgian member, who appeared at the last moment under circumstances unnecessary to detail. In the discussion of the Venezuelan Preferential Question, one of the French members of the permanent court appeared for France, as the result of which Mr. Penfield, agent

and of counsel for Venezuela and the United States, in his report, recommended that in future arbitrations

it should be stipulated that neither of the litigant states should employ as agent or counsel any member of the permanent court.

The reasons for the recommendation and the possible evil to correct which it was suggested are sufficiently obvious without special discussion.

If the Hague court is to do its best work, not only must its judges be impartial in a general sense by being free from the influence of their respective governments, but they must be so selected for each particular case as to be clear of any suspicion of bias for or against litigants. To this end, no national of a litigating country should be allowed to determine an issue as to which his own land is an interested party. I am aware that in the settlement of a case which in its importance indicated the high-water mark of international arbitrations—that of the Alabama claims—both England and the United States were represented upon the tribunal. But it will be borne in mind that against the award of this great court the English member presented an unseemly protest, while an examination of the record would show that at all times he regarded himself, perhaps unconsciously, as the advocate of the interests of his own country. We cannot overlook the circumstance that in the late Joint High Commission for the settlement of the Alaskan boundary, the two Canadian representatives declined to sign the award and, once outside the meeting room, protested vigorously and publicly against the action of their associates. One cannot be blind to the fact that the history of other mixed commissions has been similar. In the early commissions to settle claims between England and the United States, acrimonious disputes affected their usefulness and well-nigh paralyzed their purpose. Some little practical experience convinces the writer that discussions within the bosom of courts so constituted are in danger of being so heated as to interfere with arrival at just results. In the large majority of cases involving principles or situations assumed to be in derogation of the rights, or infringing upon the susceptibilities of the litigating powers, the judges named by interested nations from among their own citizens will, with rare exceptions, be found siding with the official positions of their countries, and the ultimate result, therefore, is that the grave questions at issue may be decided by the umpire, a single man, who,

however great may be his ability and however determined may be his impartiality, is likely to be affected by personal idiosyncrasies which would disappear or be balanced in a genuine court of three or more judges dissociated from the parties in interest.

The views just expressed have found large recognition in the cases so far presented to the Hague court. In the protocols providing for the settlement of the Pious Fund Case, the Venezuelan Preferential Question and the Mascate Dispute, it was expressly declared that no national of the countries in interest should form part of the special tribunals then provided. In the three cases named, the decisions of the court, whether right or wrong, carried with them a unanimity which added to the respect to be accorded to them. In the Japanese House Tax Case this idea was departed from, and in that, as the only one of the four cases before the Hague court, the national of a party in interest (the Japanese member)—and I express no opinion as to the correctness of his position—dissented emphatically from the judgment of his colleagues and sustained the position taken by his country.

I am aware that certain distinguished publicists, and among them may be mentioned conspicuously M. Léon Renault, dissent from this idea and urge that the nations in controversy should have some one present in the consultation room ready to explain the positions of their countries and enlighten their colleagues with respect to facts that they might otherwise overlook, but, to my mind, this argument involves confusion of the functions of judge and advocate, and the judges have the right always in open court to demand of the advocate any information needed. Further, the examples and illustrations above given, capable of great enlargement, sufficiently demonstrate the inadvisability of mixed courts.

I note that treaties of arbitration but just become effective between Belgium and Roumania, Denmark and Italy, Italy and Peru, Spain and Sweden and Norway (immediately prior to the separation), all provide that no subject of the signatory nations or person domiciled with them or interested in the questions in dispute can serve on the arbitral boards provided for. The suggestion now urged has, therefore, high approval.

But we must go further. Not alone should the nationals of the contending parties be excluded from the bench, but the parties themselves ought not to select their judges. At present, the rules of the

Hague convention anticipate the choice of an equal number of judges by the contending parties and their united selection of the odd man. It is but natural that the contestants should name, if they may, judges prepossessed either in favor of the nominating nation or known to be predisposed to decide the issue in a given way. The temptation would be strong on the part of the selecting nation to make choice of a judge whose prejudices might be presumed to be antagonistic to its opponent. If the court finally chosen should, for the reasons indicated or any others, contain members whose absolute even-handedness could be the subject of doubt, to that extent the dignity of its proceedings might be affected and the sanctity of its award fail in obtaining that free recognition which should pertain to the pronouncements of so preëminent a tribunal. We will consider later the manner in which this possible evil may be avoided.

But there is an important right which should be reserved to both parties—the right of challenge. There are upon the Hague court publicists or politicians who, in the most open manner, have expressed their detestation of all things American, and it would be highly unfortunate were the United States compelled to appear before a tribunal containing such prejudiced judges. Only by the preservation in some manner of a right to challenge may this condition be avoided.

Again, if upon a proposition to be submitted to the court a selected member be known to have expressed public and decided convictions, he should be liable to challenge, a right we often find it necessary to exercise against jurymen in important cases between individuals. Furthermore, although no question can be raised as to the highly honorable and intellectual character of the present court, yet, hereafter, when there will come, as must, a large increase to the membership of because additions of signatory nations, and the court may have upon it members selected perhaps for political reasons rather than because of their moral and intellectual attainments, danger may exist that, no right of challenge being allowed, a momentous question may be presented to a court whose pronouncements would fail of general acceptance by the more advanced nations and would not be in line with the consensus of opinion of the most competent exponents of the science of international law. Furthermore, we should bear in mind that the actual subordination of small nations to larger ones, which

guarantee their independence or the maintenance of their existing forms of government, may be such as to practically preclude nationals of the smaller nations from being proper judges in cases affecting the dominating powers, and from this condition of affairs may arise an additional and undoubtedly reasonable ground of challenge. For it must be borne in mind that not alone should the bench be able and impartial, but its character in these respects should be absolutely recognized by the nations at issue.

In what manner, then, may best be secured the selection of unbiased judges, maintaining a suitable right of challenge? A variety of suggestions may be made. One occurring to the writer as perhaps sufficient would be this: Whenever a case is about to be presented to the Hague court and the number of arbitrators to adjudge it has been determined by the protocol, the secretary of the court might notify the contending parties that, subject to their right of challenge, the judges will be taken from among the first ten or fifteen names appearing alphabetically upon the roll of judges and who have not been before called upon to render actual service. The parties in difference might then indicate to him their desire, if they have any, to challenge particular individuals, without, of course, being bound to state any cause for their action, and upon their answers being returned, the secretary could call upon a sufficient number of the first named qualified members to serve, filling vacancies which might arise from those lower down upon the list. Other bancs of judges could be made up in like manner until the list was gone through, and it might then be recommenced. This arrangement, however, should not operate to prevent any other manner of selection which might be determined upon in the protocol. It is believed that in the foregoing manner judges could be obtained whose determinations would be beyond all question of criticism, at least from the standpoint of partiality and most probably from that of right.

Let us summarize:

Judges upon the Hague court should, by the fact of their nomination, vacate any national position held by them. Their appointment should be for life, they receiving a salary commensurate with their positions. No judge should be allowed to practice before the court. No judge should sit upon a case in which his country is a

party. The litigant parties should not select the judges, but an ample right of challenge should be preserved.

At present questions of "independence," "honor" and "vital interests" are often reserved from compulsory arbitration. Independence is a postulate—not a matter for discussion. We may remember that in the nature of things questions of national independence cannot be considered arbitrarily any more than can the freedom of a man not charged with crime in a nation where all are equal before the law, and so remembering, this reservation becomes meaningless between nations recognizing mutually their equality by treaty. "Honor" is not a justification for private killings, and still less can it be for public ones. "Vital interests" spell out either the privilege of harrying another nation or of protecting one's self against harrying, while, were all nations obliged to submit all differences to the Hague court without any qualification as to "vital interests," there could be no harrying on the part of any nation.

With the development of a truly independent judiciary at the Hague whose deliverances were recognized as of necessity based only upon immutable principles of justice, the existing bounds set to arbitration would ere long become obsolete.

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INTERNATIONAL ARBITRATION

The distinctive features of human progress in the nineteenth century were the advancement of natural science, discovery and invention, the growth of human freedom and political liberty, the unifying and nationalization of races into independent states and the development of the principle and the extension of the practice of international arbitration.

If the experiment of international arbitration had not been made—even in a rudimentary form—in ancient or medieval times, it would have been discovered and tried by force of political conditions and exigencies among modern nations, rapidly growing in wealth, population and power; commercially and politically active and enterprising; brought into intimate relations with one another; each having its own set of interests, its own diplomatic agencies, its own system of jurisprudence, its own tribunals for the determination of public and private controversies. Out of these multifarious relations and experiences would naturally have come suggestions of mediation, of conciliation, and of friendly arbitration.

In its origin and development, arbitration was resorted to rather as an expedient than upon principle; it was a function more or less religious or quasi religious and political in character rather than a judicial proceeding. Gradually, down to the middle of the nineteenth century—and more rapidly during the latter half of the century—it grew into final recognition as a principle of justice and high policy to be invoked and tested between differing states in all controversies not of a vital nature.

Adopted first as a simple expedient, next as a matter of policy and justice, and rarely as a matter of simple justice, it was finally developed into a permanent international institution of judicial justice by the Hague convention of 1899.

Among the institutions of human society, it has been the slowest and longest in maturing, the latest in its formal and permanent establishment. Its foundations have yet been barely laid. Its completion

involves the grandest problems, and will evoke the highest and noblest efforts of the practical statesmanship of the present and the future. The process of development of the original idea into the more complete present conception of arbitration as a principle, by a supreme judicatory of nations, was retarded by prejudice.

First there was the prejudice of the most civilized of the ancient European states that the human race consisted of Greeks and non-Greeks or barbarians, the latter terms importing notions of inferiority and hostile contempt. By later ages these terms were transformed and expanded into others only a little broader—Christians and non-Christians, or heathen—the civilized and the uncivilized, or barbarians.

Less than a half century ago the words "civilized," "semi-civilized," and "barbarous" were printed on the maps used in the public schools in the United States. The word "civilized" appeared on the maps of the United States, Great Britain, France, Germany and some other European countries. But certain European and Oriental lands were not favored with this ideographic distinction. Ignorance and the prejudices of ignorance were, as ever, more or less systematically taught as a part of the juvenile learning.

This general idea was carried into and generally practiced in the relations of states. There was no just conception of the civilization of states lying outside of the territorial confines of the Roman Catholic Church, including its Protestant offshoots. There was no conception of arbitration as a principle of justice rigorously applicable to all states as to individuals.

The academic growth of the idea of impartial arbitration between all nations has also been retarded, in some measure, by the much labored question of sanctions. The question, as generally stated, implies that behind international law and arbitration some physical force, some compulsory process to insure the observance of the law and the performance of the award, is vital. This conception of the idea of sanctions is erroneously narrow. But all the while this question has been under discussion and acting as a deterrent to the recourse to arbitration, it has been slowly working out its own solution through the agency of a superior power—the most potential and fearful of all human forces—the force of an enlightened and resourceful public opinion before which the most powerful governments, in presence of a great international injustice, stand in awe.

The growth of the idea has also been retarded by the inveterate practice of withholding from arbitral tribunals their proper judicial character through the appointment by governments of their own nationals, and therefore more or less interested partisans, as arbitrators to hear and decide controversies to which they were parties. This vice in the composition of the tribunal thus appointed, besides its various immediate harmful consequences, has brought arbitration into measurable discredit, has shorn it of its due credit as a judicial process, with the result that although there have been a large number of arbitrations, they have contributed little to the development of a consistent body of principles.

If arbitrating states adopt the rule of selection of completely disinterested arbitrators, competent and disposed to decide causes after the fashion of the higher courts of all civilized states, we may confidently expect the gradual improvement and development of a system of international jurisprudence in the same way as the municipal law has been improved by the higher courts of the United States, Great Britain, Germany and other nations.

The progress of arbitration has also been retarded by the spirit of military conquest, kept alive by the enormous and increasing numbers of the professional classes in the art of war; and by the distrust of arbitral tribunals; and by the positive unwillingness of ruling statesmen to forego opportunities to increase the territory and power of their own country.

How is it possible to deal with the practical problems of international arbitration, having as its object the preservation or restoration of peace, on the pure principles of abstract justice, without laying the spectre of military armaments which

With head uplift above the wave and eyes
That sparkling blaze,

menaces the peace of nations?

In essence, the real but non-ostensible intent and end of the overgrown armaments of today is absolutely the same as it was in the ages of Philip, of the Cæsars, of Louis XIV. and Napoleon. The real object was then, thinly disguised, to make war; the declared object now is to prevent war. The plans, the preparations, the tendencies, the results "are very similar, as things not admitting of nice distinction in language."

In modern, in medieval and even in ancient times a sovereign never made war except in spite of himself, and only after he had exhausted all efforts to avoid it.

The story familiar to every school boy of the professions of peace by the embassy of the Roman Senate to Carthage, of Cæsar and Pompey, of Napoleon and Metternich, of Napoleon III. and Bismarck, of Russia and Japan in 1903, can, in the light of events, leave no doubt of the actual significance of excessive military armaments.

Had it not been for her vast military armaments, Russia would doubtless have composed her differences with Japan in 1903. Her mighty armaments led her directly to the abyss into which Russia has fallen.

In the light of events, the circular letter of the Russian minister of foreign affairs, of January 11, 1899, has today a sorrowfully prophetic accent:

In proportion as the armaments of each power increase, so do they less and less fulfil the object which the governments have set before themselves. The economic crisis, due in great part to the system of armaments, *a l'outrance*, and the continual danger which lies in this massing of war material, are transforming the armed peace of our days into a crushing burden which the people have more and more difficulty in bearing. It appears evident, then, that if this state of things were prolonged, it would inevitably lead to the very cataclysm which it is desired to avert.

It came and by that route.

The overgrowth of the modern military system is but a revival of similar phenomena witnessed in the past, the prelude to colossal conflicts and disasters from the age of Alexander, of Hannibal and the Scipios to Waterloo and Mukden.

"The maintenance of general peace," said the Czar in his rescript, "and a reduction of excessive armaments which weigh upon all nations, present themselves in the existing conditions of the world, as the ideals toward which the endeavors of all governments should be directed."

The Greek idea of arbitration for the settlement of differences between Greek cities or states was passed on as a heritage to the medieval and even to modern times, transformed and enlarged only so far as to embrace all the Christian nations, whose numbers and power and religious faith compelled a wider application of the principle. No more among the western nations was the notion of arbitration conceived in the principles of humanity and abstract justice than it was among the petty republics of ancient Greece.

Herein lies the chief triumph of the first peace conference, and the peculiar honor of President Roosevelt in initiating and of the Emperor of Russia in issuing the call of the second Hague conference, that all the cultured nations, without regard to country, race or religious faith, are formally admitted as members of the world federation, each having full rights of open and free access to the supreme international tribunal, for purposes of complaint and defense. The direct and indirect consequences of this formal and actual recognition and establishment of the principle of equality, on the future relations of nations and of justice, as the actual guide and the final criterion of their conduct toward one another, are immeasurable—whether considered as an influence making for peace or as a source of large and more liberal ideas and principles of enlightenment, fraternity, of humanity.

The first Hague conference marked the opening of a new epoch in international arbitration. It marked the transition from the period immemorial, during which the preparations for wars and the settlements which followed wars, were the principal objects of diplomatic negotiations, to the new era when the paramount object will be the avoidance of wars and the preservation of peace. The opening era has been marked by four historic events of prime importance—the creation of the first Hague tribunal in 1902; the establishment of the peace of Portsmouth in 1905; and of the peace of Central America and the peace of Cuba, both in 1906. The way to restore peace through mediation, by the good offices of the nations, has been marked out. The one great practical problem remains—how to keep the peace.

If the paths of international peace lead through the open gateway of international arbitration, the problems to be solved in reaching the goal in view, are the most intensely practical, as they are the most fascinating problems of the statesmanship of the present and of the future. The visionary of yesterday is therefore the practical statesman of today. The foundation has been established by the Hague convention of July 29, 1899, for the pacific settlement of international disputes. The task remains to broaden the foundation and to build the superstructure. It is an intensely practical work, which time and experience will undoubtedly complete, as nearly as institutions, merely human, can be brought to perfection.

ARBITRATION AMONG THE GREEKS

The idea, imperfect though it was, of the arbitration of differences between states, appears to have been familiar to the Greeks as far back as 600 years before Christ. Plutarch relates, in the life of Solon, that a long controversy having raged between the Athenians and Megarensians over the possession of the isle of Salamis, they finally referred the decision of the question to the Lacedemonians; and the matter was determined by five Spartans, the names of whose members, given by Plutarch, are perhaps those of the first arbitration tribunal of whom any authentic record is preserved. Their names ought to be inscribed along with those of Gentilis and Grotius, on the new temple of peace at the Hague.

According to Plutarch's account, Solon appeared, as he would be styled today, as the agent and counsel for the Athenians before the tribunal. He appears to have made an ingenious plea, more specious perhaps than truthful, in behalf of the Athenians. Whether he won or lost his case Plutarch does not say, but we may infer that he was successful, since the historian informs us that Solon acquired considerable honor and authority by this affair.

Before the outbreak of the Peloponnesian war, in 431 B.C., Archidamus, their king, in addressing the Lacedemonians, on the complaints made by the Potidæans, the Corinthians and other Greek states against Athens, and on the representations thereupon made by the latter said:

These practices, then, which our fathers bequeathed to us and which we have always retained with advantage, let us not give up; nor determine hurriedly, in the short space of a day, about many lives and riches and states and honors; but let us do it calmly and send to the Athenians respecting Potidæa, and send respecting those things in which the allies say they are injured; especially as they are ready to submit to judicial decision; and against the party which offers that it is not right to proceed as against a guilty one. (Thucydides: *The Peloponnesian War*, Book I, §85.)

In the masterly letter written by Philip, King of Macedon, to the Athenians, presenting his grievances against them, he said:

"I proposed to bring our differences to a judicial determination. * * * This I frequently desired; you would not listen to it." Continuing, he said: "All this could not prevail on me to make any attempt on your city, or your navy, or your territories, although I might have had success

in most or even all of them. I chose rather to continue my solicitations to have our complaints submitted to proper umpires, and which, think you, is the fittest decision—that of reason or that of the sword? Who are to be judges in your cause—yourselves or others?" (Leland's *Translations of Orations of Demosthenes*.)

This inquiry goes to the marrow of the paramount international questions of today—shall arbitration prevail; and shall it be impartial?

Philip understood the question. Not less wary and skillful as a politician than as a soldier, he took care to get a representation for Macedon in the Amphictyonic Council.

There were many Greek associations styled by the name; but the one that met at the temple of Apollo at Delphi, in the spring of the year, and at the temple of Demeter at Thermopylæ in the autumn, was known par excellence as the Amphictyonic Council. Twelve Greek states, each having two votes, were represented in this council. Some changes took place in the council, one of them being the admission of the Macedonians in place of the Phocidians. The idea of fraternal solidarity, rooted, however, rather in community of blood, language and religion, than in political interest, always obtained among the Greeks. But the Amphictyonic Council was in no sense a national congress, charged with control or legislation of an imperial or federal character. Each state was politically independent; and the council acted not for the direction of the general affairs of Hellas but rather to restrain aggressions of one member of the council upon another, and as a conservator of religion and of Grecian honors. They sometimes acted, however, as a kind of supreme tribunal of peace, of conciliation and arbitration among Hellenic states; and sometimes they were manipulated to subserve the interests of the more powerful states. (Duruy: *Histoire des Grecs*, tome 1, p. 726–32; Smith's *History of Greece*, pp. 49, 50, 513.)

According to Merignhac, the Greeks had frequent recourse to arbitration, but only among themselves. Their arbitrations did not bear upon important political questions, but only on differences with respect to religion, commerce, boundaries and the possession of disputed territory. An arbitration was had between Athens and Megara over the possession of the island of Salamis, mentioned by Plutarch. The Etolians arbitrated a boundary dispute between the cities of Melitæa and Pera in Thessaly. Themistocles decided the controversy between

the Corinthians and Corcyrians over the possession of Leucas, a Greek colony.

Other instances are given of arbitrations of disputes between the Greek states. (Merignhac: *L'Arbitrage International*, §20.)

ARBITRATION UNDER THE ROMAN RULE; IN MEDIEVAL AND
MODERN TIMES.

According to Merignhac, Rome

never consented to settle by arbitration her misunderstandings with other states. After the example of Greece, she saw in the stranger only an enemy. She aspired to universal domination and to this end subordinated her foreign policy. Moreover, the kingly people would have considered themselves degraded in submitting to the judgment of another power. * * * Her pretension to superiority, which was the negation of the idea of arbitration, was completely realized when she became mistress of the world. * * * At first the senate, and afterwards the emperor, as absolute arbiters, gave audience to the representatives of peoples who made complaints and demanded justice. They were thus the natural judges of disputes which arose between the subject peoples. The practice of taking the senate for arbiter was even adopted by independent nations fascinated with the prestige of the Roman name. The Romans do not appear, however, to have exercised the rôle of arbiter with great good faith, sometimes settling the question by themselves, taking possession of the territory in dispute. (Merignhac: *L'Arbitrage International*, §24.)

According to Merignhac, arbitration was in vogue in the Middle Ages, as in later and modern times. The nations had a common tie of religious faith, and the bishops of Rome exercised judgment, sometimes invited and sometimes uninvited, in quarrels between peoples and kings. This was one of the great offices performed by the papacy for humanity. Archbishops, bishops, popes, sovereigns, parliaments and cities were in turn chosen as arbitrators in numerous cases. Arbitral commissions were sometimes appointed, consisting of eminent juriconsults.

Under the influence of religious and feudal ideas arbitrations were very frequent in the Middle Ages. * * * Especially in Italy, where no less than one hundred occurred between the princes and communes in the twelfth century. * * * But as absolute monarchies gradually became established in Europe, arbitrations became more rare. They diminished in numbers during the fourteenth and fifteenth centuries, and from the end of the sixteenth century to the French Revolution, they had almost disappeared from international practice. (Merignhac: §§31-43.)

OF ARBITRAL AGREEMENTS AND SANCTIONS

In former as well as in recent times, the arbitration of differences between states was usually arranged by means of special and transitory agreements. There were, however, some examples of general treaties of a permanent character containing stipulations for arbitration of differences which might arise between the contracting parties.

According to authorities cited by Merignhac:

A treaty of alliance between Argos and Lacedæmon contained a final clause providing that if any misunderstanding arose between the two allied cities, they might take for an arbiter another city, whom they might judge to be impartial. A convention between the cities of Hyerapytria and Priansos stipulated that with respect to injuries already suffered by one from the other, Enipan and Meon, the Kosmoi, that is to say, chief magistrates, of cities in Crete, should with their colleagues terminate the differences on the subject, before such tribunal as the two cities should please. With respect to future injuries, advocates should be employed according to the method described in the public edict. The Kosmoi were likewise to designate the city from which the two parties were to choose the arbitrators. (Merignhac: §23.)

This stipulation, styled the compromissorial or arbitral clause, providing for permanent arbitration, was not of frequent use in the Middle Ages or modern times.

It was of frequent use between the commercial cities of Italy. The Swiss, in their treaties of alliance, either among themselves or with other peoples, had recourse to it. In a treaty of alliance concluded in 1235 between Genoa and Venice, was an article which read: "If there should arise between said cities a difference which cannot be easily adjusted by them, it will be solved by the arbitration of the sovereign pontiff; and if one of the contracting parties act in contravention of the treaty, we consent that his Holiness excommunicate the offending city." The treaty signed in 1516 between Francis I. and the Swiss Cantons—the treaty known as the "perpetual peace"—contained the following clause: that the difficulties and disputes which may arise between the subjects of the king and the inhabitants of the Swiss Cantons shall be determined by the judgment of four good men, two to be named by each party. These four arbitrators shall hear, in a designated place, the parties or their counsel; and if they disagree in opinion, the complaining party may select in the neighboring lands, a sage and upright man, above suspicion, who shall unite with the arbitrators in order to decide the difficulty. If the dispute be between a subject of the cantons and leagues and the king of France, the cantons shall examine the complaint, and if they find it well founded, they shall bring it before the king, but if the king should not be convinced, the complaining parties can invoke the king before arbitrators who shall be chosen from among the judges

of Coire and of Valais, above suspicion to the parties; and what shall then be concluded and done by the said judges, either by judicial sentence or by amicable arrangement, shall be final and inviolably observed and irrevocable. (Merignhac: §42.)

Merignhac says that this treaty has been the basis of numerous subsequent alliances between France and the Swiss cantons.

In the last century, and more particularly during the latter half of the century, there has been a marked trend of international sentiment and practice toward the making of agreements for permanent arbitration, either by treaties concluded solely with that view, or by the inclusion of an arbitral clause in treaties of a general nature. The number of such permanent arbitration treaties now subsisting is nearly fifty.

It is now nearly sixty years since the United States first entered into a permanent treaty engagement (with Mexico) for arbitration, obligatory, unless deemed by either party "altogether incompatible with the nature of the difference or the circumstances of the case." The recent treaty for arbitration of pecuniary claims between all the American states, and the negotiation of permanent arbitration treaties among European and American states, show the powerful impetus of public sentiment in favor of arbitration.

The manner in which the question of penalties and sanctions was anciently dealt with has already been suggested; as in the instance given of authorized excommunication of the recalcitrant party. Sometimes a fine was authorized, as in the treaty of August 9, 1475, between Louis XI. and Edward IV., in which the penalty of 3,000,000 francs was named. (Merignhac: §41.)

Sometimes the parties gave bail or security for the performance of the award to be rendered.

After all is said with respect to securities, penalties and federal, or other, execution and enforcement of the awards of international tribunals, the final sanction of international law and arbitration is found in the common international juridical conscience—at bottom the same sanction as that for the rules of private morality which generally govern men in their jural and extra-jural conduct and relations. The essence of law is order; and of human law, order founded in justice. Any system of rules which produces order is law. The sanction, explicit or implicit, may influence in greater or less degree

the observance of the law, the observance of order in the conduct of individuals and of states. All rules of order have their sanction—in nature, in ethics, in statutes, in treaties, in usage and custom. The diversity in the kind and coercive force of sanctions does not alter the essential nature of law of which the criterion is order, the basis justice.

Confusion has arisen out of a too narrow conception and restriction of the meaning of the term sanction, which includes all the forces, influences, agencies and instrumentalities, of a legal and moral nature, whereby obedience to law and its judgments is enforced.

In this view, little thought need be given to the theoretical consideration of the question of the sanctions of international law and of arbitral sentences. The rule is—and the exceptions are so rare that they serve conclusively to prove the rule—that states who have voluntarily submitted to international arbitration, do voluntarily observe and execute the award rendered by the tribunal of their own choosing. The execution of all judicial decrees rests at last upon the public conscience and sentiment which makes the laws, and the condition of which the world over is a sufficient guaranty for the performance of awards solemnly rendered by tribunals created by arbitrating states.

The rising power of public opinion, together with the enlightened appreciation of selfish interest and security, explains the increasing disposition of governments to resort to arbitration and to execute the award. In the words of Baron D'Estournelle de Constant,

It is increasingly difficult for a government, even monarchic and aristocratic, to put itself in opposition to public opinion,

which, it may be added, is growing in all countries more intense and forceful and more perilous seriously to affront.

Witness Russia, the internal effects of an unpopular war will perhaps be more grave than the external consequences. * * * Herein is the sanction of arbitration. (*Les Sanctions de L'Arbitrage International*, par Jacques Dumas, preface, pp. xii and xiii.)

Experience has shown the sufficiency of this guaranty in general to insure the voluntary performance of the awards of arbitral tribunals.

It will constitute a part of the triumph of reason over brute force that no place be given to the use of violence in enforcing the execution of the arbitral sentence; that the state that fails to do so thereby vol-

untarily puts itself outside the pale of international law. And if a graver sanction were needed, provision might well be made for the creation of a supreme tribunal to be composed of arbitrators chosen from civilized states disinterested in the original controversy, authorized and empowered to hear and pass on the question whether an arbitrating state had refused to abide by an arbitration to which it had voluntarily submitted; and whether there were just and lawful reasons for its contumacy; and if not, to pass the sentence of contumacy and outlawry, with the legal consequence of non-intercourse with and political recognition by other civilized states during the delinquency. The condemnation and the adjudged penalty that clearance papers should not be issued by the latter to the ports of the former and the suspension of diplomatic relations, during the delinquency, would have all the effects of a blockade without bloodshed and without the use of force. The coercion would not be less effective because pacific. What government could justify itself before its own people and before the world and withstand the judgment of condemnation?

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A PERMANENT TRIBUNAL OF INTERNATIONAL ARBITRATION: ITS NECESSITY AND VALUE

The average individual of these modern days views war with apprehension and alarm. To him it means loss, or risk, of life or limb, either for himself or for those dear to him, or loss of business opportunities and heavy taxes. The growth of socialistic and democratic doctrines has widely spread the historic truth that in the conflicts of the past, largely brought on by the selfish greed of the oligarchic few, the plain many, "the common herd," Napoleon's "food for powder," have had their sufferings for their pains. And the heads of the aggregations of men we call "sovereign states"—the oligarchic few—softened by the spread of the civilizing influence of an industrial age, themselves begin to look on war askance, and to plan ways of avoiding it.

THE HAGUE CONVENTION

In the year 1898 the czar of all the Russias sent out his remarkable circular note suggesting a conference of the important nations of the world—those having representatives at his court—to devise means to put an end to these increasing armaments and to find means for avoiding the calamities which menace the entire world. (U. S. Foreign Relations, 1898, pp. 540, 542.)

Certain cynics on international affairs broadly intimated that Russia, having her own problems of internal administration to contend with, needed about fifty years of freedom from external pressures of all kinds. After that, tribunals of arbitration would be relegated to the lumber room of exploded fads; and a foreign office backed by a disciplined army of many million men, would dictate the policy of Europe—nay, of the world.

However this may be, and there are always such suggestions in regard to all apparently good conduct in this world, the nations responded to the call.

Thus the note, having met with a favorable reception, was followed by a later communication from the same source on December 30, 1898.

Seven themes were submitted for discussion at the international conference proposed to be held.

1. Non-increase of fighting forces.
2. Interdiction on the use of new arms or explosives.
3. Limitation of use on land of present explosives and prohibition of projectiles from balloons.
4. Interdiction in naval warfare of rams and submarines.
5. The adaptation to naval warfare of the Geneva convention.
6. Revision of the Brussels, 1874, declaration as to laws and customs of war.
7. The acceptance in principle of the usage of good offices, of mediation, and of optional arbitration for such cases as lend themselves to it, with a view of preventing armed conflicts between nations; an understanding upon the subject of their mode of application, and the establishment of a uniform code of practice.

THE HAGUE TRIBUNAL

From that historic conference sprang the Hague tribunal—the first permanent court of arbitration in the world's history.

The step so taken in advance has been a great one—but it is still in its experimental stage. Even as made, it falls far short of the necessary completeness such a step should have, to give it promise of properly fulfilling its function.

With the feature of voluntary, and not compulsory, arbitration embodied in the Hague convention we have no quarrel. As will be shown hereafter, too many human imperfections still hedge about our proposed international judiciary for any nation blindly to submit its future unknown interests and causes of quarrel to their hands for final disposition.

The Hague tribunal lacks two great elements of a permanent tribunal, in the absence of which it is practically emasculated. Until it is clothed with these attributes it is destined but imperfectly to fulfill its high office.

The Hague tribunal is not in the true sense a permanent court, it is permanent only in name. Its membership of judges is not confined to a few selected men who sit as a permanent court ready at all times to do its business and receiving a fixed salary during an appointment for life during good behavior—such as is the case with the supreme court of the United States and the high courts of other nations.

THE CONSTITUTION OF THE HAGUE TRIBUNAL

The international court at the Hague is an intermittent court sitting at intervals and having no true identity or continuity in its membership.

The signatory powers undertake to organize a permanent court of arbitration. (Art. VII, Moore's International Law Digest, vol. vii, §1086, 86.) It is accordingly provided that "an international bureau established at the Hague serve as record office for the court." (Art. XXII, *id.*) This bureau serves as the channel of communication between the powers, etc. (*Id.*, 87.) Each signatory power selects "four persons, at the most, of known competency in questions of international law, of the highest moral reputation." These are "inscribed as members of the court." (Art. XXIII, *id.*) and are appointed for the term of six years * * * which may be renewed. Provision is made to fill vacancies. "When the signatory powers desire to have recourse to the permanent court of arbitration for the settlement of a difference that has arisen between them, the arbitrators called upon to form the competent tribunal to decide this difference, must be chosen from the general list of members of the court." (Art. XXIV, *id.*, 87.) The powers having recourse to arbitration "sign a special act ('compromise') in which the subject of the difference is clearly defined as well as the extent of the arbitrators' powers." (Art. XXXI, *id.*, 89.) Failing an agreement on the arbitrators each party appoints two and these choose an umpire—if the vote for umpire is equal, his election is entrusted to a third sovereign power chosen by the sovereign powers submitting to arbitration. (Art. XXXII, *id.*, 89.) The umpire is president of the tribunal. (Art. XXXIV, *id.*) The place of the arbitration is the Hague unless otherwise agreed on in case of necessity. (Art. XXXVI, *id.*, 89.) There are provisions as to filling vacancies—the languages to be used, the steps in the procedure, the evidence and documents and oral arguments to be made, etc.

THE DEFECTS OF THE HAGUE TRIBUNAL

It will at once be noted that we have here not a permanent court in the true sense, but a list of referees from whom we may select judges as occasion offers. A clerk's office and a council to run it is all that is permanent or continuous in the organization. The judges are fluctuating—to be selected from a list of fifty—possibly 104. These are taken from their usual vocations for a few months, in sporadic instances, to decide a certain dispute in their capacities as judges and then lapse back again into the private life and environment from which they came.

The court lacks two essentials of a proper permanent court of justice.

First. It lacks a limited number of judges to whom all its business should be referred, appointed for life during good behavior, and

Second. It lacks permanent salaries paid to those judges, without regard to the business or lack of business before the court and continuing during such appointment for life.

The first essential produces a logical continuity in the decisions of the court out of which would develop, under the operation of the principle of *stare decisis*, a system of international law as reasonably consistent and logical as is possible in human affairs, just as the case law growth in England has given us the "common law of England" the Hague would give us a common law of nations.

The second essential produces a wise, impartial and unbiased temper of mind in the judges—as far as such conditions can be obtained. Under such conditions the future judge is not imperiled by the nature or effect of his decisions.

The fundamental importance of a fixed tenure of office and of fixed salaries of judges in the organization of courts of municipal law in each country, whereby those courts have been made permanent in this true sense is universally recognized. How much more weight, therefore, should be given to these considerations in determining the proper organization of a court of international arbitration.

For if, in deciding the issues involved between their own nationals, in order to obtain unbiased decisions, it is necessary to remove the judges by a fixed tenure and fixed salary from all prejudicial influences arising from the fear of injurious effects of their own decisions upon their own lives and fortunes, how much more necessary it is to use these same means to ensure impartiality in the case of an international judiciary. For a judge in deciding a case against his own nationals is destined to be subjected to the criticism, condemnation and scorn of a nation, because he has failed in his decision to uphold their interests as his fellow nationals view them. And disagreeable and unpleasant as this criticism and condemnation would be under any circumstances, how potent must be its power to coerce the mind, when future life must be lived out among and by the grace of these very critics. In fact so obvious is the perturbing influence of these considerations that many claim that an international tribunal should never have among its members any nationals of the nations whose litigation is before the court.

It follows then that no further argument is needed than the mere presentation of the facts involved in the accepted theories and practice in the organization of our municipal courts, to establish the fundamental proposition; that the method of settling international disputes by international arbitration cannot have a fair, full and adequate trial until we have as well constituted our international courts as we have already constituted our municipal courts.

The crying necessity of the hour is for the friends of peace and contemners of war to unite on this proposition and to enforce it at all times and places. There should be a persistent and constant effort made for the establishment at the Hague of a permanent tribunal of international arbitration, namely, a fixed body of judges having fixed salaries and a fixed tenure of office preferably for life during good behavior.

It may be objected that on account of the number of nations and the desire of each to be represented, this would require an impracticable number of judges on the bench.

The objection has merit. The present system of selection from the four nominees of each nation might be a preferable system. The only advantage thus lost is the advantage of continuity of membership in the court leading to a perfect development of the law under the rule of *stare decisis*. But this advantage is not an absolutely essential one to maintain. It is of small importance as compared to fixity of salary and fixed tenure in office. We now have forty-seven supreme courts in the United States and it is marvelous to see how the great body of the law so expounded is in substantial accord. The greatest divergencies occur through statutory changes.

The fixed tenure, fixed salary and freedom from, and prohibition of, other employments, however, is the one main essential advantage which we would still retain. This advantage would conserve the best chances of obtaining from our international judiciary fair and unbiased decisions.

The objection may be raised that the judges so appointed would have practically nothing to do and would grow sleek, if not rusty, waiting for business. The objector overlooks the vast amount of private claims against foreign nations—chiefly against the Latin-American republics of South America—whose weary suitors are now and have been for decades seeking redress for substantial wrongs. It is a familiar

saying of railroad men, "provide the accommodation and the traffic will grow to meet it." This would be as true in this instance. Much injustice now goes unpunished, for lack of an appropriate tribunal to which it can readily be referred.

Through years of peace we spend great sums annually in the maintenance of battleships in idleness, yet we make no complaint, for the priceless value of their presence at the crisis is ample justification for the disbursement. So here, whatever the cost, it is a negligible quantity when compared to the blessing of having the best appointed contrivance that human ingenuity can devise ready and prepared to settle amicably international disputes as they arise, and thus prevent recourse to the more wasteful and more expensive arbitrament of war. It is a business proposition with the figures in the profit and loss column all on the credit side.

THE STRUGGLE FOR EXISTENCE BETWEEN WAR AND ARBITRATION

We have in the modern world a struggle going on between two institutions, international war and international arbitration, a struggle which will end in the survival of the fittest; namely, the fittest having due regard to the conditions.

War has ever been with us. International arbitration has but lately been launched on the sea of strife. All the modern arguments are against war and in favor of arbitration. Yet war will not down at our bidding. For such persistence of an awful calamity against human sense and reason, there must be some good underlying cause, or causes. They are not far to seek. They are two. Human greed in the litigants and human imperfections in the caliber of judges. For judges are, after all, mere men, with the bias and imperfections of men. What litigant forced to accept the jurisdiction over him of our municipal judges does not ask as he enters the judicial chamber—is he honest?—is he capable?—is he impartial? And so when nations are involved, when the stakes are raised to the n^{th} power, and the tremendous issues at stake mean much and more to millions of men; with how much the more anxiety and zealous care such questions are asked. And the answers must be absolutely and certainly favorable or even war with all its horrors, is a preferable substitute for submission of such quarrels to a wrong tribunal.

The two systems, then, are this day on their trial before men. No right-minded human creature is in doubt as to which system he prefers. Then every right-minded man should bend all his energies to giving the advantage in the race to the system of arbitration. This can only be done by establishing it in the best possible form, surrounded by the most favoring and favorable conditions.

The importance of this can hardly be overestimated. Perhaps it can best be shown by a statement of the development of the two systems and noting the parallelism to be drawn between war and arbitration in international law and trial by combat and trial by court or jury in municipal law.

THE USES OF WAR

War has had and may yet have its good issues. Its true function has been to weld families into tribes, tribes into nations and nations into larger sovereignties. It is probable that in the "grand scheme of things entire" it has not yet exhausted its proper activities. So long as the so-called inferior races exist, there must go on a somewhat different treatment of them than we accord to the superior, or else the unfit will inhabit the choice places of the earth, and crowd out the relatively more highly civilized. Either our treatment of the Indians was practically right, or we should now restore to the remaining tribes the inheritance of their fathers—a conclusion so practically absurd as to shake the premise from which it is derived.

But these conditions do not prevent the establishment of international arbitration among the nations of high civilization known as the world powers.

It is, however, possible that before the scheme of international arbitration shall take its place as a resolver of the disputes of men, wars shall go on until nations have been welded into sovereignties, divided only by lines of racial divergence. Should one race rule the earth and all the people therein, we would be threatened with civil wars breaking up the coalesced molecule into its component parts.

To avoid this perspective of future strife and carnage, the alternative is presented of now adopting a system of international arbitration. War and arbitration have come into direct competition and the fittest will survive—bearing in mind always that the fittest is not always the best, but the fittest having due regard to the environment. The

illustrations drawn from parasitic life make the meaning clear. Hence if we are to advance the cause of the institution we favor, we must make the environment as favorable as possible for its survival as the fitter of the two.

THE CONDITIONS NECESSARY TO MAKE ARBITRATION THE FITTER INSTITUTION

Before any institution in the world can be superseded by another, that other must prove itself capable of producing better results. Before international arbitration can become the preferred method of settling national quarrels in place of war—the resort to brute force—many conditions must concur.

First: The moral natures of men—and especially the natures of the politicians in high place guiding and directing national conduct—must have reached the point of not desiring national worldly advantage in lands, or goods, or influence, beyond what an impartial judge would award to the interests in dispute.

Second: The horror of war with his “grim visage and fierce front” shall be ingrained to such an extent as to deter selfish action threatened with such dire consequences.

Third: The honesty, impartiality, learning and well balanced justice of the decisions rendered by tribunals of international arbitration shall be so apparent that the honest and just disputant can find no objection to delivering up his interests for disposal to such fair and capable hands.

The three essentials named need not all be realized in their entirety to produce a resort to international arbitration. As matters now stand, the decision “to arbitrate or not to arbitrate” is one of mixed policy, dependent chiefly upon the importance of the question involved, and next upon a due balancing of expediency, having regard to the second and third conditions above mentioned as they may exist for the particular case.

So far as concerns the first prerequisite, our moral natures in this, the beginning of the twentieth century, may be assumed to be much improved upon the conditions existing in Europe in the eighteenth century, which witnessed the successive partitions of Poland. Yet the insistence of Russia upon the continued occupation of Manchuria, in

violation of the treaty of Peking (1901), leading to the late Russo-Japanese war, can hardly be cited in proof of this proposition.

Assuming, however, an improved moral nature in the nation which loves justice and abhors war, the difficulty of satisfactorily realizing the third prerequisite is the true bar to the customary adoption of international arbitration.

For it must be admitted that the decisions of international arbitrators, in the past, have been as full of human frailty, human prejudice, and human error, as other things that are human.

If, then, the cause of international arbitration is to be advanced, the best efforts of all men's minds must be directed to the improvement of these conditions, to the investigation of the causes of the mistakes and disappointments of the past, and to devising ways and means of obviating them so far as may be possible in the future.

THE PARALLEL BETWEEN THE DEVELOPMENT OF MUNICIPAL AND INTERNATIONAL LAW

In international law, itself, the comparatively short time within which the struggle between war and arbitration has been going on furnishes us with scant materials from which to derive lessons of experience. Fortunately there exists so close an analogy between the evolution of international law and the evolution of municipal law that from the experience gained in the history of municipal law much may be learned as to the proper development of international law. For there is a curious parallelism between the development of persons and subject matter in the evolution of municipal law and the development of persons and subject matter in the evolution of international law.

Municipal law has, for its units, the persons within the state, and, for its field, the domain of the individual sovereignty and the relations of its persons within that domain.

International law has, for its units, the sovereign states themselves, and, for its field, the inhabited globe and the relations of its units within that space.

Municipal law has reached a comparatively high stage of development. Its central powers have established tribunals to the arbitrament of which its units are compelled to submit their private quarrels. Thus we have compulsory arbitration in municipal affairs and the

absence of private war. That this condition was not always thus, we will later show.

International law is in its infancy. It has no sovereign central power capable of forcing its units to submit their disputes to compulsory arbitration. And it has no tribunal instituted for the purpose of passing upon such disputes fixed and ready for the litigation when presented. Its units are free to accept or reject arbitration, are free to decide their quarrels by the sword—public war.

Yet in historic time within the domain of municipal law, or rather the sovereignty which should have acted and did not act, there long existed the system of private war for the settlement of disputes between men; just as there now exists, in international law, the system of public war for the settlement of disputes between nations. And the evolution of affairs whereby, within the systems of municipal law, private war has been superseded by compulsory court proceedings is a course of events which is perhaps prophetic of what is to happen in the domain of international law, when public war shall be superseded by the system of compulsory arbitration.

So the study of the struggle for existence between the early forms of settlement of disputes between men in municipal laws and the final survival of the fittest institution by the establishment of compulsory arbitration in the courts may help us the better to understand how to advance the cause of international arbitration, and how to make it the survivor and the fittest in its struggle for existence in international law with its competitor—war.

The struggle for existence in municipal law between private war and the courts; and later, between trial by battle and trial by court or jury *in the courts themselves*, foreshadowed this later struggle for existence in international law between war and international arbitration.

PRIVATE WAR VS. THE COURTS

Primitive society, whether founded on patriarchal or some other system, existed before the establishment of any institution similar to our courts for the settlement of disputes among its members. The triune structure of the social organism, chief, distinguished few, and undistinguished many, constituting the social organism formation in sociology, analogous to the germ, nucleolus and nucleus, constituting the cell formation in physiology, existed long before the differentiation

of the kingly functions developed into judges and courts of law. (Spencer's Political Institutions.)

During long ages of development a struggle went on—first between private war, which was equivalent to the settlement of private disputes outside of the king's courts, and the attempt of the central authority to compel the cessation of these little wars and the settlement of these disputes in the king's courts. Later, when the central authority was gaining ground, it was able to compel the ordinary citizens to come into the king's courts for the settlement of their disputes. The better to do so, in view of their warlike natures, the king's courts at an early stage instituted a system of trial suited to the genius of the age, namely, trial by battle, where the private war in the form of the *duello* could be waged under rules and restrictions with judges to referee the fight and insure fair play.

The forms of trial by ordeal and by compurgation are as old as society itself. These superseded for a time by the trial by battle, again came into vogue with somewhat more favor when Christianity overcame heathenism. Still later they were superseded by the trial by court or trial by jury in the king's courts about the same time that trial by battle itself was superseded and became unsuited to the age.

Thus Glanvill

raises the question of whether the lord may not demand an aid for the maintenance of a war in which he is concerned meaning by "*guerra sua*" his own, the lord's, private war, but concludes that such a demand cannot be pressed. (1 Poll. and Mait., Hist. Eng. Law, 2d ed., 349; Glanvill, IX, 8.)

And as showing the persistence of private war even in England, Pollock and Maitland cite the case of the dispute between the Earl of Gloucester and the Earl of Hereford, who were sent to prison for indulging in it in time of Edward I. (1 Poll. and Mait., Hist. Eng. Law, 2d ed., 302.)

The same learned authors say:

In France there arose a jurisprudence of private war, for which see Viollet *Etablissemens* 1, 180, Esmin, *Histoire du droit Français*, 252. (1 Poll. and Mait., Hist. Eng. Law, 2d ed., 303.)

Stephen says:

The early English criminal procedure was of two kinds; namely, the law of *infangthef*, a procedure so summary as hardly to deserve the

name, and the law of purgation and ordeal (*urtheil*), a system which formed the first step toward our modern law. (Stephen: *Hist. of English Crim. Law*, 59.)

He further, calling attention to the importance of private war in reference to the laws of the early English, says:

In the laws of Alfred it is enacted, "that the man who knows his foe be home sitting fight not before he demand justice of him. If he have such powers that he can beset his foe and besiege him within let him keep him within for seven days and attack him not if he will remain within." Several other delays having been provided for, the law proceeds "if he will not deliver up his weapons then he may attack him." Liberal exceptions are allowed to the restriction imposed by the law on private war. "With his lord a man may fight *orwige* (*i. e.*, without committing war) if any one attack the lord: thus may the lord fight for his man. In nearly all the laws provision is made for the breach of the king's, the lord's or the church's peace or protection (*faith-bryce*, *mund-bryce*) in such a way as to show that peace was an exceptional privilege, liability to war the natural state of things. The king's peace was extended to particular times and places, or conferred as a favor on particular persons. (I Stephen: *Hist. of English Crim. Law*, 60.)

Again he says:

A single step, but still a step however short, from private war and blood feuds is made when people are invested by the law with the right of inflicting summary punishment on wrongdoers whose offenses injure them personally," referring to the law of summary executions or *infangthef*. (*Ibid.*, 61.)

Tylor says:

Law, however, though it has so beneficially taken the place of private vengeance, has not fully extended its sway over the larger quarrels between state and state. The relation of private vengeance to public war is well seen among rude tribes, such as inhabit the forests of Brazil. When a murder is done within the tribe, then of course vengeance lies between the two families concerned; but if the murderer is of another clan or tribe, then it becomes a public wrong. The injured community hold council, and mostly decide for war if they dare; then a war party sets forth, in which the near kinsmen of the murdered man, their bodies painted with black daubs to show their deadly office rush foremost into the fight. Among neighboring tribes the ordinary way in which war begins is by some quarrel or trespass, then a man is killed on one side or the other, and the vengeance for his death spreads into blood feud and tribal war ever ready to break out from generation to generation. This barbaric state of things lasted far on into the history of Europe. It was old German law that any freeman who had been injured in body, honor, or estate might, with the help of his own people, avenge himself

if he would not take the legal commutation; that is to say, he had the right of private war. It was a turning point in English history when King Edmund made a law to restrain this "unrighteous fighting," but it was not stopped at once, especially in Northumberland, and we know how it went on into modern times between clan and clan in the wild Scotch Highlands. Long after the mere freeman ceased to go to war with his neighbors, there were nobles who stood to their old right. As late as the time of Edward IV., Lord Berkeley and his followers fought a battle with Lord Lisle at Nibley Green in Gloucestershire. Lord Lisle was slain, and in the end Lord Berkeley compounded by a money payment to the widow. Freeman, who in his *Comparative Politics* mentions this curious incident of fifteenth century history, thinks it the last English example either of private war or the payment of the wergild. The law of England which forbids the levying of private war represents one of the greatest steps in national progress. The state now replaces by the justice of legal tribunals, the barbaric expedients of private vengeance and private war. But state and state still fight out their quarrels in public war, which then becomes on a larger scale much what deadly feud used to be between clan and clan. (Tylor: *Anthropology*, 418.)

TRIAL BY BATTLE VS. TRIAL BY COURT OR JURY—ARBITRATION—
IN THE KING'S COURTS

As an institution to settle the disputes of men in municipal law, trial by battle competed with the systems of trial by ordeal, by oath or compurgation, and later by jury in England, and by judge alone in France, from the time of its inception until its disuse as herein mentioned.

The dates differed at different times and places, and therefore can not be summarized. But during the centuries referred to, the struggle for existence was going on between the different forms of trial in municipal law. As shown by Pollock and Maitland, the original difficulty of the social central power had been to get the litigants away from their private war into court. (1 *Poll. and Mait., Hist. Eng. Law*, 2d ed., 50.) When he got them into his court, the king used to compel them to pay for the privilege. Thus we find in the early records citations as follows:

Anno 1344 Rich 2 A combat was granted to an esquire born in Navarre to fight an English esquire, called John Welsh, whom the Navarroiis accused of treason. But the true cause of the Navarroiis, his malice was, that the said Welsh had dishonored his wife, as (being vanquished) he confessed. The king gave sentence he should be drawne and hanged. (Cited in *Kendall Trial by Battle*, 166.) Richard 1 Gerard de Brocton gave forty shillings to have his Duell in the King's Court. (*Madox: Hist. of Excheq.*, p. 66.)

It began to fall into disuse in England, for we find William Marchal, in 1220, offering the sum of 1000 marks, a large sum in those days, for the privilege of fighting Fawkes of Breaute. (2 Poll. and Mait., Hist. Eng. Law, 2d ed., 608, note 3.) And the same authors state that trial by battle in civil cases disappeared in England soon after the time of Glanvill. (*Id.*, 633.) Thus wager of battle was not allowed in the action of debt in the thirteenth century. (2 Poll. and Mait., Hist., etc., 214.)

While on appeal in criminal cases the system lasted until 1818, its repeal being hastened by the decision in *Ashford v. Thornton*, 1 Bar. and Ald., 405.

The case which thus established an institution as having vitality in criminal law, some six centuries after its abolition in civil law, is so interesting that a digression to state it summarily may be pardoned.

Thornton, suspected of the murder of Mary Ashford, had been tried by a jury and acquitted. An appeal was brought by her brother. On the return day, November 2, 1818, Thornton pleaded in person to the indictment before the court of king's bench, "Not guilty and I am ready to defend the same with my body," "and thereupon taking his glove off, he threw it upon the floor of the court." After solemn argument on demurrer to this plea, the court held the plea good. The brother of the murdered girl refused to risk his life in single combat against the suspected murderer, and Thornton went free.

So passed into history a curious case of the survival of an old custom despite the lapse of time and changed conditions of morals and civilization. It is mentioned to show how stubbornly trial by combat held its own, at least in criminal law, far beyond the day and time of its usefulness.

And Dr. Cooper in his *Statutes at Large of South Carolina*, writing in 1837, seems to think that wager of battle and appeal in criminal cases was still legally in force there. (Cooper: *Stat. at Large*, S. C., 11, pp. 403, 715, cited in Lea, p. 199.)

The last attempt at trial by battle in civil cases in England appears to have been the case of

Claxton v. Lilborn,

in 1638. The dispute was over an estate in Durham worth 200 pounds a year. Each party produced champions, and the court delayed from

day to day adjudicating the combat. The champions admitted that they were being paid for their services. The king demanded to know from the judges whether this did not vitiate the demand for trial by combat. The judges answered to the contrary. However, the judges procrastinated for years as to setting the date for trial, and we find Lilburn petitioning the long parliament, which thereupon ordered a bill to take away the right of trial by combat. (See Rushworth's Collections, vol. i, p. 1, pp. 788-790, p. iii, p. 356, cited in Lea's Superstition and Force.)

Trial by combat was prohibited in France by ordinance of St. Louis in 1259. (2 Poll. and Mait., Hist. Eng. Law, 604.) As a matter of fact, however, the power of the king was not equal to the occasion and it was reinstated in criminal cases by Philippe LeBel in 1306. (Lea: Superstition and Force, 181.) The last trial by combat occurred in France in 1549. (*Id.*, p. 191.)

Trial by battle was prohibited in Burgundy by Philippe LeBon in 1410. (Lea, p. 180.) It was abolished in Normandy in 1583. (*Id.*, 188.) It existed in Brittany in 1539. (*Id.* p. 187) It was prohibited by the council of Trent in 1563. (*Id.*, 192.) It was forbidden in Italy in 1505. (*Id.* 192.) It lingered in Flanders till late in the sixteenth century. (*Id.*, 192.) Combats were fought in England in civil and criminal cases from Henry II. to Elizabeth (Gibson, p. 32), and down to 1631 and 1638 (1 Poll. and Mait. 33.)

The last reported case of trial by compurgation in England occurred in 1824, *King v. Williams*, 2 Barnewall & Crenwell, 538. (2 Poll. and Mait., 601.)

During all these centuries the other ancient modes of trial, the ordeal and trial by compurgation, were competing with trial by combat, and later, since the Grand Assise of Henry II., trial by jury was competing with trial by combat as a system to solve disputes of men in municipal law.

PREVALENCE OF PERJURY THE CAUSE OF PERSISTENCE OF TRIAL BY BATTLE

In view of this survival of trial by battle far into the Middle Ages, we naturally inquire what was the reason that so rude a device should have so long persisted in the different nations as against the rational system of trial by judge or jury. The answer is that the secret deadly foe of

the judge or jury system was the perjury prevalent during this time, and that the existence of perjury misleading judges and juries was the condition rendering trial by battle a preferable tribunal in the estimation of the age. The proof of this is not far to seek. We find it clearly stated in an old German law cited in 17 Ency. Brit., 9th ed., 820, "*that they avoid perjury; let two be chosen to fight.*" Again, Pollock and Maitland say "Trial by battle was to avoid perjury." (1 Poll. and Mait.: Hist. Eng. Law, 50.)

Gibson says "other causes, such as systematic perjury of witnesses," etc., maintained the system in France. (Gibson, 33.) He cites Hallam's History of Europe in the Middle Ages, i, p. 187, citing Beaunanoir, who wrote to the same effect in the reign of Philip the Bold, and in the Assise de Jerusalem (200 years before Philip the Bold) no mention is made of any other form of trial than by battle. (Gibson, 33.)

The difficulty with the system of trial by ordeal was priestly fraud. The difficulty with the systems of trial by compurgation and jury was prevalent perjury.

As in the system of trial by compurgation, the defendant went free if he succeeded in having a number of his neighbors come forward and swear that they believed in him when he swore to the denial of the charge, it will be evident that prevalent perjury would soon throw discredit upon such a system. So prevalent perjury in witnesses, so hard to detect even with all the skill of the modern system of cross-examination, scarcely known in those days, must have led to many unjust verdicts; and thrown discredit upon the system of trial by jury.

"For," says Hallam, "perjury was the dominant crime of the middle ages; encouraged by the preposterous rules of compurgation and by the multiplicity of oaths in the ecclesiastical law. (Hallam: Middle Ages, Suppl. Notes, p. 260.)

Trial by ordeal fell into disuse, and trial by compurgation was ultimately restricted to the action of debt. Coke in explaining in his own time the preference of plaintiffs in suing a claim in the form of an action upon the case (where defendant was not allowed to "wage his law" or bar the claim by trial by compurgation) instead of in the old action of debt, stated it was because in his times "men's consciences do grow so large" that they swore off a debt action with impunity. (Co. Litt., 295 b.)

Curiously enough we find this system of trial by compurgation as a

means to escape private war among the Arabs. An article in the *Columbia Law Review* as late as February, 1907, pp. 100, 106, cites a case in *Al Bukhari*, Delhi ed., vol. i, p. 542, as illustrating this early custom of the Arabs. A member of one family being suspected of having killed a member of another is approached by one of the members of the family of his victim, who strikes him, saying: "You have killed one of our men;" but Khadish denied the charge. Abu Talib next went up to the man and said:

Choose at our hands, one of three things: If you wish, give a hundred camels for the murder of our kinsman, or, if you wish, get fifty of your tribesmen to swear that you have not killed him. If you refuse either of these, we will kill you in his place.

The case was referred to the judge

who decided that fifty men of Banu Amir—the family of the man charged—should swear before the Kabah that Khadish had not killed the man.

On the other hand, the system of trial by battle fell into disuse when in some cases it was allowed to put forth champions to fight for the respective litigants. The original idea in this system had been that the god of battles took care of the right, and that justice should win. But the retainer of these hired champions evidently left the decision largely in the hands of the litigant with the longest purse. (2 Poll. and Mait.: *Hist. Eng. Law*, 2d ed., 633.)

In fact, as shown in *Lea on Superstition and Force*, these hired champions ultimately became a class by themselves as low in the social scale as the gladiators had sunk in the Roman society before them or as the fallen women of our own day are considered. (See *Lea: Superstition and Force*.)

IMPROVEMENT IN MORALS CAUSED SURVIVAL OF TRIAL BY COURT OR JURY

Thus each system had its drawbacks. In the struggle for existence between them, the gradual improvement of the morals of the age leading to less frequent perjury and the passage of statutes, such as the statute of frauds and the statute of limitations, barring probably perjury in the cases where it was likely to be most dangerous and least likely to meet with direct evidence in rebuttal, led in England to the survival of the system of trial by jury as against its competitors, trial by battle, by ordeal and by compurgation.

Again, it must be borne in mind that the original common law rule that no party or person interested in the event was a competent witness before the tribunal—a rule only relaxed within the last half century, was a rule without which probably trial by jury could never have survived as the fittest tribunal. At any rate, the insistence upon the rule for centuries was probably much better founded in good reason and accurate knowledge of the conditions of the environment than would be admitted by Bentham.

Thus through the centuries of the development of municipal law, we may trace a struggle for existence between trial by battle, modified private war, and trial by court or jury—arbitration in the settlement of the disputes of men, bearing a strict analogy to the existing struggle for existence in international law between the system of trial of international causes by war and by international arbitration. God grant that as in the case of municipal law the system of court trial has survived as the fittest institution and superseded the former cruel and barbarous manner of settling issues, that so likewise in the law of nations the system of arbitration shall survive and supersede the cruel and barbarous system of deciding quarrels by trial by public war.

TWO CONDITIONS OF SURVIVAL OF COURT TRIAL—ARBITRATION

The analogy points out two conditions under which court trial has superseded private war and trial by battle, which conditions, if we desire to have international arbitration supersede public war, must be striven for to obtain that end.

These conditions are that private war existed so long as there was no central authority compelling submission of the quarrels of men to courts. That it even existed after courts were established in the mode of trial by combat, and that it only disappeared through the strong arm of the king in his endeavor to prevent the loss of his subjects in duels and frays and to keep them to use their energies in defense of the state instead of allowing them to be wasted in mutual destruction of each other.

So the first prerequisite of a proper system of international arbitration should be the establishment, in connection with a permanent court, of a permanent central power capable of enforcing submission of quarrels to the court and compliance with its decrees.

In the present age, however, the hope of the establishment of such a power is almost Utopian; though it must come some day if the evolution of nations is to follow the evolution of man.

Some slight approach to a central power of the character named is now arrived at by treaties and *dreibunds* when several important states unite for the purpose of protecting their joint interests in regard to public questions.

Again, the power of public opinion, volatile and evanescent as it is, is nevertheless, a strong moral force acting upon states, compelling them to observe the principles of morality in carrying out the covenants of treaties when awards have been made against them; and so compelling the execution of the arbitrator's mandate.

As conditions exist, however, it would be useless to strive for Utopia. We may merely recognize the lines of true development, and can only hope to see them traveled in the dim future.

There is a second lesson to be drawn from the evolution of systems of trial in municipal law and its teaching should be followed so far as possible in advancing the interests of arbitration under the law of nations. Causes which interfere with the validity and accuracy and the equity of the system of arbitration we practice, must be removed in so far as we may possibly accomplish their removal if we desire arbitration to survive as against war in the struggle for existence. For the nations of the world are only tentatively committed to this great advance of the present constitution of the Hague tribunal; the court is still merely an experiment, an experiment under conditions, unfavorable to giving the experiment a fair chance to survive.

We have shown above why the Hague tribunal falls far short of being a true permanent court of arbitration. It lacks such qualities through the absence of permanent personnel of its judges; a permanent tenure of office with permanent salary, and the failure to withdraw its judges from all other avocations to attend to the duties of the court alone.

PRESENT SYSTEM OF JOINT COMMISSIONS OF ARBITRATION DEFECTIVE

It now remains to show that as arbitrations have been held heretofore under joint commissions between the nations by the selection from time to time of individuals without much previous training or preparation as judges, chosen in one or two fugitive instances, and who,

on the decision of the case, sink back again into the position of the laity from which they sprang, we have an improper and poor system from which the best results, or even good results, cannot be well expected.

It is maintained that the awards of these tribunals have been full of human error, and to that extent the cause of international arbitration has suffered so that its survival in the face of competition from war has been rendered uncertain and precarious. To prove the truth of this assertion, we now cite a few examples. These are taken from the international arbitrations of private claims. We purposely abstain from bringing in question any of the great cases where public interests were involved, such as the *Alabama* award, the fur seal arbitrations and others. To criticise the decision of any of these would be to draw into a discussion intended to be strictly academic the disturbing influences of national bias and passions where the great interests at stake cloud clear judgment in critic and audience, and invite a concurrence or rejection of the critic's views equally untrustworthy and useless from a scientific point of view. Again, it would be impossible, in the space of this article, to prove the validity of any criticism made on such a case on account of the multiplicity of the facts and arguments involved.

We therefore select awards on private claims where our readers, through lack of national bias or pre-judgment, will be the better able to follow the argument and approve or disapprove of the justice of our criticism.

MISCARRIAGES OF JUSTICE ARISING FROM IMPROPER AWARDS OF INTERNATIONAL ARBITRATIONS UNDER THE PREVAILING SYSTEM

I. FRAUD IN THE ARBITRATORS

The United States and Venezuelan Commission of 1866

Under the convention between the United States and Venezuela of April 25, 1866, a joint commission passed on forty-nine claims against Venezuela of the nominal amount of \$4,823,273.31. (2 Moore Int. Arb., 1660.) It made awards upon twenty-four claims to the amount of \$1,253,310.30, and rejected twenty-five claims. (*Id.*)

On February 12, 1869, the Venezuelan government made a protest against the awards to the United States government, claiming fraud, etc. (*Id.*, 1660.)

The matter was investigated and reinvestigated. Congress finally adopted a resolution directing the secretary of state to suspend the distribution of the sums paid by Venezuela on account of the awards, and recommending the creation of a new commission. (*Id.*, 1661)

The charges against the commission as developed in the investigation were to the effect that a conspiracy was entered into between the United States commissioner, the United States minister at Caracas, and his brother-in-law to defraud the claimants by exacting of them a large proportion of their awards in the form of attorney's fees; that the brother-in-law thus obtained contracts with claimants to represent them before the commission for 40 to 60 per cent of whatever might be awarded; that the selection of the umpire was made in an irregular manner; and that on claims which the brother-in-law represented, awards were made to the amount of more than \$850,000, while many meritorious claims were rejected; that the certificates of the award were made in small amounts payable to bearer and were withdrawn by the United States commissioner, and that after the claimants received their proportion under their contract with the brother-in-law, the balance was divided between the United States commissioner, the United States minister at Caracas, his brother-in-law, and the umpire. (*Id.*, 1662.)

The president, in May, 1882, sent congress a special message in regard to the matter. Thereupon the committee on foreign affairs of the house of representatives made a report stating that the former commission "was a conspiracy; its proceedings were tainted with fraud; that fraud affects its entire proceedings;" that its decisions were a nullity and that a new commission be appointed to pass *de novo* on the claims.

Accordingly a joint resolution to that effect was passed in March, 1883. (*Id.*, 1664.)

Thereupon a new commission was appointed which passed upon the old claims and others then presented.

It is a matter of satisfaction that the foregoing is the only known case of apparently proven fraud on the part of arbitrators in the history of international arbitration.

II. PERJURY AND FRAUD IN THE CLAIMANTS, BY WHICH THE ARBITRATORS WERE DECEIVED, RESULTING IN UNJUST AWARDS

Three celebrated cases of this kind occurred.

The Gardiner Case

One George A. Gardiner, a dentist, presented a claim against Mexico before the commission on claims against Mexico appointed under the treaty between the United States and Mexico of February 2, 1848. The commissioners allowed \$428,747.50.

Shortly after the award, there was much criticism of it on the ground of the relations of Gardiner's counsel with Mexican officers and with the commissioners and cabinet officers of the United States.

Congress finally, on an investigation, determined that the claim was the product of forgery and false swearing, but that counsel had nothing to do with its fraudulent concoction.

So indictments were had against Gardiner. The United States senate sent a committee to Mexico to investigate the story of his despoilment. The committee reported, after investigation that the whole claim was founded on perjury and forgery. Gardiner committed suicide before he could be tried on the indictment. (2 Moore Int. Arb., 1255-1259.)

The Weil Case

This was a claim presented to the Mexican claims commission under the convention between Mexico and United States of America of July 4, 1868.

Weil claimed \$334,950 for the destruction of 1914 bales of cotton. The testimony in favor of the claim, which was twenty years old, was on affidavits, etc. The umpire awarded \$285,000 with interest, etc. (2 Moore Int. Arb., 1347.)

The La Abra Case

Before the same commission was submitted the claim of La Abra Silver Mining Company. The claim was for about \$4,000,000, and the umpire allowed on it \$358,791.06. (2 Moore Int. Arb., 1329)

Mexico moved for a re-hearing, in

The Weil and La Abra Cases

but the umpire denied this chiefly on the ground that he had no power. Mexico claimed that the two claims of Weil and La Abra were fraudulent and based on perjured testimony. (*Id.*, 1330.)

Mexico paid the first instalment on the awards, but the executive officers of the United States took no action to distribute it, requesting the action of congress in the premises, and suggesting the charges of fraud in the Weil and La Abra cases.

Finally, in 1878, an act was passed providing for a reinvestigation of these two cases. Meantime, the United States distributed on the La Abra claim \$240,683.06, and on the Weil claim \$171,889 64. (*Id.*, 1337.)

Negotiations were opened with Mexico for a new hearing of these claims. Pending these proceedings, one of Weil's attorneys applied to court as assignee of a part of the award for a mandamus to compel Mr. Frelinghuysen, as secretary of state, to distribute the instalment then in his hands. The proceedings was dismissed and the dismissal was affirmed by the United States supreme court. (*Frelinghuysen v. Key*, 110 U. S. 63.)

A similar proceeding in the La Abra case shared the same result. (110 U. S. 63.)

The matter dragged along, and when Mr. Blaine became secretary of state in March, 1889, another mandamus was brought against him to compel payment of the claim, but was dismissed in *People ex rel Boynton v. Blaine*, 139 U. S. 306. (2 Moore Int. Arb., 1347.)

In 1892 acts were passed by congress conferring jurisdiction on the court of claims to investigate both the Weil and La Abra cases. (*Id.*, 1347).

The court of claims found that the award in La Abra case was obtained "by fraud effectuated by means of false swearing, and other false and fraudulent practices." (*United States v. La Abra Silver Mining Co.*, 32 Co. Cl., 462, affirmed in *La Abra Silver Mining Co. v. United States*, 175 U. S., 423.)

The Weil case resulted in a similar judgment. (*United States v. Alice Weil*, 35 Co. Cl. 42.)

In 1900 the United States returned to Mexico the undistributed balance of the moneys paid by Mexico on the two awards thus found to have been procured by perjury, etc. (7 Moore Int. Law, §1083, 68.)

And congress subsequently appropriated the sum of \$412,572.70 for the repayment of the instalment already distributed in the two cases. Act of February 14, 1902, 32 Stat. I 5.

III. IMPROPER AWARDS ARISING FROM HUMAN IMPERFECTIONS IN THE ARBITRATORS—IDIOSYNCRASIES LEADING TO FALLACIOUS REASONING AND UNJUST CONCLUSION.

In connection with this branch of the subject matter we may say that the cases hereinafter mentioned are not exhaustive, but typical.

Owing to the fact that a judge is presumed to be right in his reasonings and conclusions no proper or convincing criticism can be made upon his decision except at the expense of stating fully the facts of the case, his reasonings and conclusions on the facts, and then the reasonings and conclusions of the critic to establish the incorrectness of the decision. This necessarily compels a voluminous statement of each case. Therefore only a few cases can be properly so dealt with in an article of this character.

It may, however, be stated without qualification that no fair-minded man can read the arbitrations involved in the five volumes of Mr. Moore's International Arbitrations, the Venezuelan Arbitrations of 1903 (Ralston's Report), and the French-Venezuelan Arbitrations of 1902 (Ralston's Report), which volumes embody practically all of the arbitrations in which the United States has engaged, and note the conclusions arrived at upon the several claims without having forced upon him a conviction that in a great number of the cases great injustice has been done.

In so criticising these results, attention is not especially directed to the actual wrong decision of cases where the merits have been inquired into and decided, but rather attention is called to the numerous instances in which injustice has been done by reason of the failure on the part of the arbitrators to investigate the merits and their tendency to bar the investigation of the merits on various technical grounds.

The arbitrators instead of going upon the principle of "*ubi jus ibi remedium*" and the further principle that treaties are to be liberally construed (these conventions for arbitrations being in the nature of treaties) have, in most cases, spent the force of their logical acumen and ability in technical interpretation of the terms of the conventions

resulting in the strictest possible construction whereby claims have either not been passed upon on the merits, or, if so passed upon, have been pared down and whittled away on different technical pretexts.

One arises from the perusal of these decisions with a feeling of disappointment at the results accomplished by international arbitration so far, and a further impression that international arbitrators are somewhat imbued with the idea that the presentation of a claim against a foreign government stamps the claimant as one who has unduly expanded his just rights, or as one who is trying to beat the government out of the amount he claims. Truly in these cases has the maxim "*potior est conditio defendentis*" been exemplified and applied *ad nauseam*.

We now call attention to a few glaring instances of injustice in international arbitration.

The two cases first cited belong partly under the II subdivision above and partly under this III subdivision. Thus the Pelletier case appears to have been a case where the arbitrator misconstrued his authority under the protocol, and hence is under this subdivision yet has some elements under subdivision II. The Lazarre case would appear more properly to come under the II subdivision as a case of fraud or suppression in the testimony deceiving the arbitrator, yet it has elements bringing it under this III subdivision also. Accordingly as the errors of the arbitrators were discovered and set aside by one man, Hon. Thomas F. Bayard, United States secretary of state, they are inserted under this head, and without going into the fact or arguments to any great length Mr. Bayard's conclusions are accepted as making them proper examples of miscarriages of justice.

The Pelletier Case

Under the convention between the United States and Hayti, of May 24, 1884, a claim was submitted on behalf of one Pelletier. He was the master of a bark, and had been arrested in Hayti and condemned to death on a charge of piracy and attempt at slave trading, the conviction being reversed by the supreme court of Hayti, and on his re-trial he was sentenced to five years' imprisonment and his vessel was forfeited.

The arbitrator awarded Pelletier \$57,250. Hayti remonstrated against the award. Mr. Bayard, as secretary of state, practically set

the award aside on the ground that it appeared from the arbitrator's decision that he considered (1) that, as a claim had been made, he was restricted to the decision of a pure question of law; and (2) that the protocol, by requiring him to decide

according to the rules of international law existing at the time of the transactions complained of,

restricted him to the decision of the sole question whether Pelletier had been guilty of piracy by law of nations, as distinguished from piracy by municipal statute, and compelled him to award damages in case he should find that piracy by law of nations had not been committed. Mr. Bayard, on the other hand, maintained that the protocol was not designed in any way to limit the arbitrator's inquiries into the merits of the claim before him, but was intended

merely to insure the investigation of those merits upon principles of international law contemporaneous with the alleged wrongs, undoubtedly the true test of Hayti's liability. (2 Moore Int. Arb., 1799.)

Mr. Bayard pointed out that

it was a rule of international law in 1861, and is a rule of that law now, that offenses committed in the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law, which becomes for the particular purpose the international law of the case. It matters not what the offense may be termed if it appear that a violation of the municipal law was committed and punished. *Ibid.*

Mr. Bayard further maintained that it was the duty of the executive to refuse to enforce an unconscionable award; which, for his reasons stated, he deemed this one to be, namely, an alleged mistake of the arbitrator in determining the principles of his decision. (*Id.*, 1800.)

The Lazare Case.

A somewhat different question came up in the Lazare case under the same protocol between the United States and Hayti of May 24, 1884. This claim was based on a contract made between Lazare and the Haytian government for the establishment of a national bank at Port au Prince, with a capital of \$3,000,000, the government to furnish one-third and Lazare two-thirds. Lazare claimed that on the day the bank was to be opened, the Haytian government, holding that he had not satisfied his part of the arrangement, declared the agreement void,

and he sued for damages. The arbitrator found in favor of Lazare, allowing him \$117,500. (*Id.*, 1793.)

Hayti protested against the award and presented new evidence, on the faith of which Mr. Bayard, as secretary of state, reported in favor of opening the award. (*Id.*, 1800.)

His recommendation to re-open the Lazare case rested: (1) On certain papers in the department of state which were not shown to have been laid before the arbitrator; (2) on irregularities in the arbitrator's proceedings; (3) on errors in the award; (4) on the alleged newly discovered evidence, and (5) on a letter of the arbitrator to the Haytian minister. (*Id.*, 1801.)

It may be noted here that the action of Mr. Bayard in thus setting aside the Pelletier and Lazare awards for errors, etc., would form clear precedents justifying the United States in demanding a re-hearing of the award in the Venezuelan case of the Orinoco Steamship Company against Venezuela hereinafter mentioned.

The United States and Paraguay Navigation Co. v. Paraguay Case

This company was organized under the laws of Rhode Island for the purpose of developing the resources of Paraguay by commerce and manufacturers, and to take advantage of the public decrees and laws of Paraguay granting patent rights for a term of years on industrial inventions, and extending similar privileges to persons who first introduced into the country foreign discoveries. (2 Moore Int. Arb., 1497.)

The attempt was to establish a great and permanent business. The actual expenses and losses in so doing amounted, with interest, to \$402,520.37, according to claimant's claim. This expenditure was chiefly for the cost and equipment of steamers and other vessels sent to Paraguay, for machinery and implements sent thither, for land and buildings purchased there, and for salaries and wages paid to employees. Damages were claimed on these items and for destruction of grants made by the laws of Paraguay in the nature of patents for machinery, etc., loss of profits on a cigar factory, saw mill and brick-machine already in operation, also damages for expulsion, compensation for patent rights, grants and franchises, aggregating a total amount of about \$1,000,000.

Paraguay's defense was chiefly that there were no damages. The convention acknowledged the liability of the government of Paraguay to the company, and the commissioners were named

to investigate, adjust and determine the amount of the claims of the above-mentioned company upon sufficient proofs of the charges and defenses of the contending parties. (*Id.*, 1495.)

After hearing the evidence, the commissioners decided that the company had not proved or established any right to damages, and Paraguay was not responsible for any damages or pecuniary compensation whatsoever in the premises. (The United States and Paraguay Navigation Co. v. Paraguay, *id.*, 1501.)

The obvious criticism of this award is as follows: By the terms of the convention Paraguay had in general terms conceded its liability to the claimant. The commissioners were appointed to assess the damages. Yet these same commissioners taking up in detail each occasion of loss or item of damage held that Paraguay was not liable for the specific acts leading to this damage or that loss resulting in an award of nothing due, and this under convention conceding liability.

It is unnecessary to go into the details of the case, for the subsequent action of the governments indicates that the award was justly subject to severe criticism.

President Buchanan was so dissatisfied that he decided to submit the subject to the consideration of the senate. In his message he criticised the decision on the ground that the commissioners had misapprehended their powers in holding Paraguay not liable when the terms of the protocol admitted that she was liable and only damages were to be assessed.

The result was so unsatisfactory that the claim of the United States and Paraguay Navigation Company was afterward submitted, in 1861, by the Lincoln administration to Paraguay, but President Lopez declined to re-open it.

Again, in December, 1885, during Cleveland's administration, Mr. Bayard, secretary of state, instructed the chargé d'affaires of the United States to Paraguay

to ask the government of Paraguay to open the award, giving as a reason for the desired action the grave doubt felt by this government as to the regularity and validity of the arbitration.

The negotiations following resulted in a protocol August 12, 1887, by which it was agreed that Paraguay should pay to the United States and Paraguay Navigation Company \$90,000 in gold. The protocol passed the Paraguayan senate, but was rejected by the chamber of deputies by a majority of one vote. (*Id.*, 1544.)

Further negotiations resulted in a new protocol providing for the payment of same amount. This passed the Paraguayan senate but not the house, and so the claimants failed to recover. (2 Moore Int. Arb., 1545.)

Thus Paraguay escaped all damages after having solemnly conceded her liability.

The Meade Case

This curious case resulted in an absolute miscarriage of justice—an injustice which was due to the technical and inequitable decision arrived at by an American commission of arbitration under the treaty between the United States and Spain, ratified October 5, 1820.

The facts of the case can best be summarized by copying a part of the head note in the report of the case in the court of claims. (Meade v. United States; 2 Nott and Huntington, 224.)

They are thus stated:

An American merchant in Spain has claims against the Spanish government arising on contract and for personal injuries. Prior to the treaty with Spain of 1819, he files notice of his claim with the secretary of the United States. The treaty includes all claims thus filed prior to its date. It is signed by both parties and ratified by the United States. Spain refuses to ratify; the time within which it must be ratified expires, and the United States gives notice that "all causes of difference" between the parties "will stand in the same situation as if that convention had never been made." The merchant then presses his claims directly and procures their acknowledgment and liquidation from the Spanish government, through the report of a royal junta in the nature of a decree. This decree covers the contracts and personal injuries, and includes interest. It is approved by the king, and by the laws and customs of Spain is of as high and binding a nature as the judgment of any tribunal. On the trial before the junta the merchant puts in evidence and surrenders all his vouchers and evidences of indebtedness. They are cancelled and filed in the finance department of Spain. The cortes determined to provide for the payment of the decree. They are informed by the Spanish secretary of state and by the American minister at Madrid that if the treaty of 1819 be ratified and certain private grants in Florida be annulled, the United States will pay the claim of the merchant. On the faith of these representations the cortes

annul the private grants, Spain ratifies the treaty, the United States accepts the ratification, and acquire thereby the Floridas free from the private grants. While the final acceptance of the treaty is under consideration, the merchant notifies the president and senate that if special provision is not made for the full and immediate payment of his claim he prefers to remain a creditor of Spain, and objects to the indebtedness being appropriated by the United States. No such provision is made and he is sent, with other claimants, before a commission established by the treaty. The commissioners refuse to recognize the Spanish decree, and require him to produce the original vouchers. The government sustains the commissioners and demand the vouchers. Spain refuses to deliver them and the commission expires. The United States pay to other claimants the \$5,000,000 provided by the treaty. The claim of the merchant is lost by the refusal of the United States to recognize the Spanish decree, and of Spain to furnish the original vouchers. By the convention of 1834 (8 Stat. at Large, p. 460) the United States again releases Spain from all claims of American citizens.

The American commissioner decided April 16, 1823, as follows, that the commissioners had no jurisdiction of the claim as a liquidated demand against Spain resting on the award of the royal commission. He argued that under the treaty they were required to ascertain the

validity and amount of claims, and that this language required them to treat claims as unliquidated.

Hence they were precluded from admitting the liquidation by Spain as the basis of allowance, both because it was subsequent to the signing of the treaty and because it was, as to the United States, *res inter alios acta*. (5 Moore Int. Arb., 4487, *et seq.*)

Commissioner White argued (as quoted in 2 Nott. 7 Huntington, 263) that if Spain did not owe anything at the date of the treaty, then she was still liable on this claim. If she did owe at the date of the treaty, there must be some evidence existing at that date of the extent of the liability.

That evidence would be better than the mere settlement with the Spaniards and ought to be produced.

In this case (4 Moore Int. Arb. 3567) the commission, therefore, determined that the original documents must be produced from which they could ascertain the validity and amount of the claim.

Previous to this decision, Meade made application to the Spanish minister at Washington to obtain the original documents, but had received an unfavorable answer.

May 13, 1823, the United States minister to Spain was instructed to apply for the papers. Owing to the blockade of Cadiz by a French squadron at the time of his arrival, it was not until December 19, 1823, that he was able to make formal application to the Spanish government for the documents. The government acceded to his request, but intimated that there would be some delay owing to the confusion in the public offices by the removal of the government from Seville to Cadiz. Mr. Meade was unable to obtain his documents, and the claim was rejected for want of sufficient evidence to establish its validity ten days before the expiration of the commission.

This peculiar concatenation of circumstances led to the following grossly inequitable result.

Because the treaty provided for a commission to "receive, examine and decide upon the amount and validity" of claims presented to the department of state, etc., since 1802, "and until the signature of the present treaty," the commissioners held that only *unliquidated* claims were included, and that *liquidated* claims or claims of a subsequent date were not included, and that Meade's claim could not be proved by the subsequent Spanish award on it, but only by the original papers.

The common sense answer to this argument is that the words "decide upon the amount and validity" do not necessarily mean that each and every claim shall be unliquidated. Used with reference to a number of claims as they were in this instance, they are apt and proper words to express a decision upon liquidated as well as unliquidated claims included in the number.

This broader construction is clearly enforced by principles of equity when we consider that the United States, in presenting the claims of its citizens, would have had a much stronger case for its international demand upon a liquidated claim than upon an unliquidated one. Therefore it is altogether too narrow a construction to hold that the treaty was intended only for the object of enforcing unliquidated claims and not liquidated ones.

Hence had the Spanish arbitration of the Meade claim reached its award prior to the date of the signature of the treaty, there is no reason or principle, in justice or otherwise, why that award should not have been proper evidence of the claim.

In this connection it must be borne in mind that the general rule is that a treaty speaks from the date of its ratification. Had this been

the rule adopted with the Florida treaty as to all of its clauses, the Spanish award in the Meade case would have been a fact occurring prior to the ratification, and hence a part of the claims provided for and not a subsequent one.

The commissioners, however, by strictly adhering to the letter of the clause in the treaty referring the claims intended to be covered, to those filed in the secretary of state's office of the United States at the time of the "signing of the treaty," prevented the application of this general rule.

Thus by a strict adherence to the letter of the treaty instead of the spirit of the negotiation, the commissioners, in effect, adjudged that Meade's claim, as an *unliquidated* claim, was something entirely distinct from the final Spanish award on it in 1820.

The Meade claim was one of the largest of the American claims filed in the state department against Spain, on the basis of which the treaty was negotiated whereby, in consideration of the United States releasing these American claims and paying the claimants \$5,000,000, Spain ceded the Floridas to the United States.

Thus, by the decision of the commissioners the petitioner's *unliquidated* claim filed in the state department is treated as so distinct from his *liquidated* claim arrived at by the judgment of the Spanish arbitrators—such arbitration being the only international court known for such matters, and, as such, being a merger of the original claim as between the parties—that he can not prove his *liquidated* claim by proving its merger into a judgment so as to satisfy the United States commissioners of its validity. Yet this very *unliquidated* claim, as merged into the liquidated award and judgment of the Spanish arbitrators, is still a claim which, under the renunciation in the treaty, was released by the United States to Spain on the final ratification of the treaty. So for the purpose of preventing the claimant from proving his claim before the United State commission, his *unliquidated* claim and his *liquidated* claim are treated as two distinct things. And yet for the purpose of leaving him no remedy whatever against Spain or anybody else, the liquidation by the arbitration judgment merges the original claim and leaves him remediless so far as any claim against Spain would be concerned by the very operation of the treaty on its becoming operative by ratification after the Spanish award was obtained.

Such a glaring injustice could not go unchallenged. So the Meade case was brought before congress and was finally sent to the court of claims for adjudication, and, having been dismissed by that court, was by a new resolution, referred to that court again for the purpose of having a new decision.

The claim, as then presented, had necessarily to take a different attitude. The gist of the claim as presented was that Meade was entitled to recover his claim from the United States because of the negligence of the United States in not diligently prosecuting his claim and obtaining from Spain the original documents so as to get his claim proved before the first commission within the time limited for its deliberations. To such extremes of argument were Meade's counsel driven through the injustice of the first decision of the original commissioners.

It would have been better to have attacked the first decision as being absolutely void for errors in law apparent on its face, and as a judgment without just reason to support it for the reasons hereinafter to be given.

Meade had the best counsel in the land, in Bradley and Cushing, to support his claims, but the principles of international arbitration of private claims were in their infancy in those days.

The court of claims decided against Meade's contention holding (one judge out of three dissenting) that the United States was not liable, and that however inequitable the result, the claim must be dismissed. (Meade v. United States, 2 Nott & Huntington, 224.)

Casey, C. J., in delivering an elaborate opinion in which he finally dismisses the claim, says, p. 271:

Most of the difficulties that have attended this case originated in what we deem a mistake of the commissioners under this treaty. They applied the strict, rigid, technical rules of evidence that belong to the administration of municipal or criminal justice in the adjustment of these international affairs to which they were inappropriate. The engagements of nations, the adjustment of their claims upon each other, or those of their respective citizens and subjects should not, and for obvious reasons can not, be subjected to the narrow technical rules of ordinary tribunals.

Referring to the decision of the commissioners refusing to allow the Spanish award as evidence of the claim, Casey, C. J., at p. 272, further says that this was "serious error;" that it was still the same claim; that the Spanish award was a Spanish decree merging the origi-

nal claim, and, as such, *res adjudicata*, and *not res inter alios acta*, for the reason that throughout the whole transactions the United States had been kept advised of the situation, had been the active agent in prosecuting the Meade claim with Spain diplomatically up to the point of obtaining the Spanish arbitration of it; that the United States, in purchasing the Floridas partly in consideration of this very claim, had, in a sense, become a surety and party and privy to it, and that when, having obtained notice that this judgment had been had upon the claim, they further pressed the claim against Spain and on its faith obtained the cession of the Floridas and thus became the purchasers of the Floridas, the adjudication became one binding upon them as purchasers of the claim *pendente lite* with notice, and as party and privy to the whole transaction, and concludes, p. 273:

Upon even the narrow, technical rules applied by the commissioners, the decree of liquidation was evidence. I think it should have been conclusive.

And he further holds that at any rate it was *prima facie* evidence of the claims and was only liable to be impeached for fraud.

Referring to the commissioners' views as to their limitations in ascertaining the validity and amount of the claims, Casey, C. J., says, p. 274:

But the ascertainment of these facts must be understood to be by the usual and ordinary methods of proofs. Not by any arbitrary rule of exclusion or admission.

The court, however, regretfully held that they had no right or power to correct the commissioners' mistakes or to remedy the wrong thus perpetrated; that the decision of the special tribunal was conclusive and that was the end of the matter.

Nott, J., dissenting, at p. 315, etc., held that when the executive found that the Meade claim had been made a part of the consideration of the cession from Spain of Florida, it should have withdrawn the claim from the commission under the original treaty and paid it. That Meade, after the treaty failed, became the creditor of Spain, and this credit was released by the United States under the treaty; that the United States had never paid for it, or afforded means of paying for it; that his claim was now attempted to be blocked by holding that the decision of the commissioners was on the same subject matter, which

was not so. Also that since congress had referred back the case to the court of claims after the court of claims had dismissed it on the very ground of the former decision of the commissioners, that thereby congress had specifically waived the former judgment and that now to hold that that judgment was binding was to disregard this waiver.

The decision of the court of claims dismissing the claim was affirmed by the United States Supreme Court in *Meade v. United States*, 9 Wall. 691; 76 U. S. 694.

It is difficult to point out a flaw in the reasoning whereby the court reached this conclusion. The whole inequity must be referred back to the door of the errors made by the American commissioners in the arbitration under the treaty.

Thus the United States received a princely domain paid for, partly, by the release of this very claim, and yet the claimant received nothing, and a great injustice was perpetrated.

The court says:

Entitled, as the claimant clearly was, to prove his unliquidated claims before the commissioners, it is much to be regretted that he did not seasonably come to the conclusion to adopt that course and avail himself of the plain right secured to him by the treaty. His error in that behalf increased the equation to other claimants, and now his only remedy is by an appeal to the equity of congress. (76 U. S. 694.)

Up to date it would appear that the "equity of congress" has not been equal to the occasion.

The Didier Case

Next we would call attention to the Didier case, decided by the United States and Chilean claims commission, convention of August 7, 1892. (Shield's Report, 41.)

The United States presented a claim against Chile on two contracts made in 1816 between General José M. Carrera, the duly authorized representative of the republican government of Chile, and D'Arcy and Didier, etc. The agent of Chile demurred on the ground that Chile was, at the time the contracts were made, a Spanish colony, the independence of Chile being recognized by the United States in January, 1822, and consequently the commission had no jurisdiction of the claim.

The United States claimed that its recognition of the independence of Chile related back to the beginning of the Carrera government in 1811.

A majority of the commission, Messrs. Claparede and Gana, decided that the commission had no jurisdiction on the following grounds:

(1) That until the United States recognized Chile, Chile was *de jure* Spanish and no legal international relations began between the United States and Chile until the recognition.

(2) That the convention did not intend to include claims arising out of the period prior to the recognition of the government of Chile by the United States.

Mr. Goode, the United States commissioner, dissented. A rehearing was had and argument made. The United States claim was that since September 18, 1810, had always been celebrated in Chile as Independence Day, and since the revolutionary government of José M. Carrera had been successful and the new government was the mere successor of the successful revolutionists, claims against the revolutionists were properly against the new government founded on the successful revolution.

The convention of August 7, 1892, between the United States and the republic of Chile provided for the settlement of claims that citizens of one country might present against the government of the other,

without determining the period within which the acts giving birth to such claims occurred.

The majority of the commission adhered to their former view, and the claims were dismissed. (4 Moore Int. Arb., 4329.)

In this connection it may be well to state that the United States has always maintained the doctrine of international law insisted upon in this case, namely, that a *de facto* government binds a succeeding government, whether the *de facto* government was revolutionary or not. (William v. Braffy, 96 U. S., 176. See also Bolivar Railway Co. Case, Ven. Arb., 1903, 388), Plumley, umpire, holding that a nation is responsible for the acts of a successful revolution from the time it began.)

The Walters Case

There, Walters had entered into a contract with the municipality of La Guayra, the government of Venezuela, whereby he agreed to construct a mole and breakwater at that port for 275,000 pesos in coin or its equivalent in currency. Certain duties received at the customs house at La Guayra were set aside for these payments, but the government had diverted the revenues, and since June 30, 1858, when the balance was reduced to 24,956⁵³/₁₀₀ pesos, nothing had been paid.

There was practically no defense to the claim, except that a question was raised as to which pesos the money was to be paid in.

Mr. Little says:

There are two pesos known to commerce, the peso fuerte and the peso sencillo. The former was the old Spanish silver dollar equal in value, until modern years, the world over, to 100 cents in gold. The latter is meant when the general term is used in transactions without the qualifying word. According to letters received by the commission from the director of the mint and other sources of information, we estimate its present value at 75 cents to the dollar expressed in gold coin of the United States,

and the award was accordingly.

Little, commissioner, for the commission, Amanda G. Walker, executrix, v. Venezuela, United States and Venezuela Claims Commission, convention of December 5, 1885.

It will be noted that the contract called for 275,000 pesos in coin or its equivalent in currency. (4 Moore Int. Arb., 3567.)

As a matter of fact there is only one peso "in coin" in Venezuela, and that is the peso fuerte. The peso sencillo is a pure fiction of the imagination. It has never been coined or any fraction or multiple of it coined. The peso fuerte is a well known silver coin of about the same weight and fineness as our silver dollar, and it is current in Venezuela where silver is supposed to be on a parity with gold at about the value of our dollar. Thus the lack of knowledge of local conditions on the part of the commissioner deprived the claimant in this case of twenty-five cents on the dollar of his claim.

The Orinoco Steamship Company Case

The case of the Orinoco Steamship Company against the republic of Venezuela. (Ven. Arb. of 1903, Ralston's Rep., 72.)

In that case the Orinoco Steamship Company demanded payment of the government of Venezuela on three claims as follows:

(1) \$1,209,700.05 as due for damages and losses caused by the executive decree of October 5, 1900, having annulled a contract concession celebrated on May 26, 1894.

(2) 100,000 bolivars, or \$19,219.19 overdue on account of a transaction celebrated on May 10, 1900.

(3) \$147,638.79 for damages and losses sustained during the last revolution, including services rendered to the government of the republic. (Statement of the claims by Umpire Barge, Ven. Arb., 83.)

The arbitrator finally allowed on the third claim about \$28,000, and disallowed the others.

In showing the injustice and absurdity of these decisions, it will be necessary to take them up in detail and show the provisions of the protocol and the facts on which the claims were based.

A. The \$100,000 Bolivar Claim

The second claim was founded on the following facts:

On May 10, 1900, claims between the Orinoco Shipping and Trading Company and the Venezuelan government being pending, a written contract of settlement was entered into, abstracted as follows:

Art. 1. R. Morgan Olcott, on behalf of the Orinoco Shipping and Trading Company "agrees to consider as settled all claims, debts and demands whatsoever which the company may have against the government of Venezuela for services," damages, etc. * * *

Art. 2. The government of Venezuela gives to the said company, by its representative, Mr. R. Morgan Olcott, and by way of payment for the causes above specified, the sum of 200,000 bolivars in coined money and in the following form:

A. 100,000 bolivars in cash, which the said Mr. R. Morgan Olcott acknowledges to have received to his satisfaction:

B. 100,000 bolivars which shall be paid in accordance with such arrangements as the parties hereto may agree upon, on the day stipulated in the decree, 23d of April ultimo, relative to claims arising from damages caused during the war or by other cause whatsoever.

Art. 3. R. Morgan Olcott, in representation of the company hereby accepts all the foregoing.

Art. 4. All doubts and controversies which may arise with respect to the interpretation and execution of this contract shall be decided by the tribunals of Venezuela and in conformity with the laws of the republic, without such mode of settlement being considered motive of international claims.

The learned umpire overruled this claim for \$100,000, the balance due on this written instrument, on the following grounds:

As expressed in his own language after quoting Article 2 B of the foregoing contract, he continues as follows:

And whereas nothing whatever of any arrangement, in accordance with which it was stipulated to pay, appears in the evidence before the commission, it might be asked if, on the day this claim was filed, this indebtedness was proved compellable.

Note—When the claim was filed, eighteen months had passed since the date of the agreement.

Under the terms of the protocol the arbitrators were

*"to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them" * * * and they shall "decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation."*

The recognized principle of jurisprudence in regard to covenants to pay money where no time is mentioned or agreed upon is that the payment is to be made within a reasonable time. This the court determines upon.

Accordingly, the learned umpire's decision that this was an indebtedness not "proved compellable" is about as absurd a proposition as one is likely to meet in the law reports. At any rate, it is an inequitable decision in view of the settlement made, as shown by the contract, and it is certainly not a decision of this case on the "*basis of absolute equity*" AS REQUIRED BY THE PROTOCOL.

The second ground of rejection of this claim for 100,000 bolivars on this written document was that it did not appear that the transfer of this credit to the Orinoco Steamship Company from the Orinoco Shipping and Trading Company had been "notified to the government of Venezuela" and

according to Venezuelan law, in perfect accordance with the principles of justice and equity recognized and proclaimed in the codes of almost all civilized nations such a transfer gives no right against the debtor when it was not notified to or accepted by the debtor. (Ven. Arb., 1903, *id.* 92.)

As to this it is only necessary to remark that, without going into Venezuelan law on the subject, of assigning credits which the umpire has confused and misinterpreted, the objection in the end amounts to an interposition of a technical objection founded on the provisions of local legislation. Hence the decision, in following such provisions of local legislation instead of deciding, as required by the protocol, all claims upon a basis of absolute equity, is in direct violation of the terms of the protocol on this point.

The arbitrator rejected this 100,000 bolivar claim on the further ground that the fourth clause in the contract above recited, shortly known as the "no reclamation clause," barred the claimant because he had made the claim a matter of international reclamation and thereby committed a breach of his contract. This objection will be dealt with *infra*.

B. The \$1,000,000 Claim

The important claim of the Orinoco Steamship Company against Venezuela was the claim for over \$1,000,000 for "damages and losses caused by the executive decree of October 5, 1900."

The claim was founded on the following facts:

The company claimed an exclusive franchise granted to them by the United States of Venezuela to transfer goods, wares and merchandise between the ports of Trinidad, British West Indies, and Ciudad Bolivar, Venezuela, through the Macareo and Pedernales channels of the river Orinoco, arising out of the following facts:

On the first of July, 1893, Gen. Joaquin Crespo, then in possession of the executive power of the United States of Venezuela, issued his executive decree as follows:

Art. 1. Vessels engaged in foreign trade with Ciudad Bolivar shall be allowed to proceed only by way of the Boca Grande of the river Orinoco; the Macareo and Pedernales channels being reserved for the coastal service, navigation by the other channels of the said river being absolutely prohibited.

On January 17, 1894, Venezuela entered into a contract with Ellis Grell to the following effect:

Art. 1. Ellis Grell undertakes to establish and maintain in force navigation by steamers between Ciudad Bolivar and Maracaibo within the term of six months reckoned from the date of this contract, and in such manner that at least one journey per fortnight be made, touching at the ports of La Vela, Puerto Cabello, La Guira, Guanta, Puerto Sucre, and Carupano, with power to extend the line to any duly established port of the republic.

Art. 6. The general government undertakes to concede to no other line of steamers any of the benefits, concessions and exemptions contained in the present contract as compensation for the services which the company undertakes to render as well to national interests as to those of private individuals.

Art. 12. While the government fixes definitely the trans-shipment ports for merchandise from abroad, and while they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curacao and Trinidad, and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco in conformity with the formalities which by special resolution may be imposed by the minister of finance in order to prevent contraband and to safeguard fiscal interests; to all which conditions the contractor agrees beforehand.

Art. 13. This contract shall remain in force for fifteen years, reckoned from the date of its approbation, and may be transferred by the contractor to another person or corporation upon previous notice to the government. The transfer shall not be made to any foreign government.

Art. 14. Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations.

Two copies of this contract, of the same tenor and effect, were made in Caracas, the seventeenth day of January, 1894.

On October 18, 1898, a transfer of the contract to the Orinoco Shipping and Trading Company, Limited, was ratified by the government. (Ven. Arb., 1903, 99-101.)

On October 5, 1900, Cipriano Castro, general-in-chief of the army of Venezuela and supreme chief of the republic, decreed:

Art. 1. The decree of the first of July, 1893, which prohibited the free navigation of the Macareo, Pedernales and other navigable waterways of the river Orinoco is abolished. (*Id.*, 104.)

The umpire rejected this claim on the following grounds:

(1) That "the contract in the whole does not show itself as a concession for exclusive navigation of any waters, but as a contract to establish a regular navigation by steamers between the duly established principal ports of the republic," and that the permission granted by article 12 of the contract to "any one of the steamers leaving Trinidad" to navigate by the channels of the Macareo and Pedernales, never was a contract for the right of exclusive navigation of those channels, but was "a mere arrangement by which temporarily the right of vessels bound to coastal service, namely, to navigate said channels, would be safeguarded for the vessel that left Trinidad as long as the vessels of this service would be obliged to call at this island," and therefore the contract approved by decree of 8th of June, 1894 (26th of May, 1894), never was a contract for the exclusive navigation of said channels of the Orinoco." The decree which reopened those channels to navigation could not annul a contract which never existed.

The second ground on which he denied relief was that the permission giving to the company's steamers leaving Trinidad to navigate these channels

would only have force for the time till the government would have fixed definitely the trans-shipment ports, which it might do at any moment and till the necessary installations were made, and not for the whole term

of the contract, which, according to article 15, would remain in force for fifteen years. (*Id.*, 88.)

And therefore

it seems impossible that the permission given in article 12 only for the time there would exist circumstances which the other party might change at any moment could ever have been the main object of the work (*Id.*, 88).

Hence the benefit and exemption granted by this article was not to navigate by said channels but to hold the character and rights of ships bound to coastal service, notwithstanding having called at the foreign port of Trinidad, and as this privilege was not affected by the reopening of the channels to free navigation, the decree did not annul any concession existing, and there were no damages. (89-90.)

The third ground of dismissing the claim was that even if the reopening of the channels to free navigation was a breach of the concession, then the provisions of article 14, known as the "no reclamation clause," which the company had violated, prevented any recovery.

The fourth ground of rejection was that because the Orinoco Shipping and Trading Company had transferred the concession to the Orinoco Steamship Company, and could only do so, under the provisions of article 13, "upon previous notice to the government," and that had not been given, there was no right to the transfer, the transfer was null and no damages could be recovered.

Taking up these grounds of rejection in their order, we criticise them as follows:

The umpire states that the claim asserted by the claimant is the right to the exclusive navigation of the main channels of the Orinoco river, and proceeds to demolish it by showing that these channels had always been open to navigation by vessels engaged in the coastal service. As the company's vessels were intended to be engaged in the coastal trade, no permission was needed to enable them to navigate through these channels.

As a matter of fact, however, article 6 of the claimant's memorial (*id.*, 99) asserted the contract right as follows:

¹ The exclusive right or franchise granted by the United States of Venezuela to transport goods, wares and merchandise between the ports of Trinidad, British West Indies, and Ciudad Bolivar, Venezuela, through the Macareo and Pedernales channels of the Orinoco.

This right, franchise or privilege had been specifically forbidden to all vessels engaged in foreign trade with Ciudad Bolivar by article 1 of General Crespo's decree of July 1, 1893, above quoted.

The right was specifically granted by the Venezuelan congress to the claimant's assignor by article 12 of the concession relied upon, and by article 6 of the same instrument the government, "*as compensation for the services which the company undertakes to render,*" etc., undertook *not to concede to any other "line of steamers any of the benefits, concessions and exemptions contained in the present contract."*

The two decrees read together, therefore, clearly gave this company an exceptional right, which was exclusive by its terms, to transport goods, wares and merchandise between Ciudad Bolivar and the foreign ports named.

The objection that because the government might put an end to this monopoly under article 12 by making the necessary installations and "definitely fix the trans-shipment of merchandise from abroad and that therefore this monopoly was not an object of the contract" until that act was done—the act never having been done up to the time of the hearing of the claim before the commissioners—is absurd upon the face of it. For article 6 clearly gives to the company, and prohibits to any other line of steamers, "*any of the benefits, concessions and exemptions contained in the present contract.*" And whether this franchise was so granted for a minute or century or until the government took some other step to determine the privilege, it does not lie in the mouth of an arbitrator, in the absence of the determination of the privilege by the act of the government as provided in the contract—calmly to eliminate from a written instrument one of the covenants which the parties have inserted on the ground that, being a matter which could be determined by act of the party, it was therefore of minor importance and not an "object of the contract." *Non constat* but that the physical or other difficulties in the way of the government "fixing definitely the trans-shipment ports for merchandise from abroad and * * * making the necessary installations" was the fact relied upon by the concessionaire as, giving the concessionaire the exclusive privilege, he was granted during a term long enough in all probability to meet his wishes. At any rate down to the very decision of the arbitrator, such reasons or other reasons of equal

weight had prevented the government from determining the franchise in the only way in which it could be validly determined under the provisions of the concession. The arbitrator, therefore, disregarded the contract and made a new one to his own liking for the parties.

Finally the umpire dismisses the claim on the existence of the no reclamation clause. He says:

It must be concluded that article 14 of the contract disables the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen. (Ven. Arb. of 1903, 91.)

It will be seen that article 14 of the contract is simply a contract to refer all disputes to the Venezuelan courts and a covenant that they "*shall not in any case be considered as a motive for international reclamations.*"

The parallel in municipal law to this covenant may be found in those stipulations made between contracting parties which are designed by the agreement of the parties to oust the jurisdiction of municipal courts.

It is settled in municipal law that a provision that all matters of dispute arising shall be arbitrated is not binding. The party to the contract may sue, and the merits of his case are investigated by the court notwithstanding his breach of this covenant. The covenant is declared to be against public policy, since the courts are established for the purpose of determining these questions. (Haggart v. Morgan, 5 N. Y. 422, 55 Amer. Decisions, 350; Delaware & Hudson Canal Co. v. Pa. Coal Co., 50 N. Y., 250, 258; National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439, 442; Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 254; 34 L. Ed. 419.)

It is declared that it is against the public policy of municipal law "*to sanction contracts by which the protection which the law affords the individual citizens is renounced.*" (Delaware & Hudson Canal Co. v. Pa. Coal Co., 50 N. Y., 250, 258.)

The units of the municipal law are the individual citizens composing the state, and over them is established a central legal authority and court having the jurisdiction and power to decide disputes between them and enforce its decrees.

The units of international law consist of the sovereign individual states, and over these there is no established central authority and

no court having jurisdiction of international disputes and the power to enforce its decrees. In lieu of such an established international forum there remains to remedy any international wrong the process of intervention by the state of the citizen wronged. This is done through that state applying by suggestion of good offices and intervention to obtain an arbitration; or if that fails by its intervention by war to redress the injuries perpetrated by the foreign state upon its citizens.

In the question of whether such injuries shall be settled or waived, or in what court, and under what circumstances, and before what tribunal such claim shall be adjusted; the sovereign state, whose citizen has been injured, has an independent right to determine for itself the punishment to be meted out for the wrong, or the remedy which should be sought, independent of the rights of the citizen himself to such remedies. For a wrong done to a citizen of a state by foreigners in a foreign land is, under such circumstances, an insult and indignity heaped upon the state to which such citizen belongs, and, as such, is resented as an insult or injury to the body politic itself.

The principle is as old as the imperial rule of the Romans, whose "*civis romanus sum*" was a passport and a safeguard throughout the world.

Both, then, because of this right in the body politic to remedy or avenge a wrong done to one of its members in its own way, and because the only proper forum for the settlement of international disputes is the international forum standing for those disputes in the same place as the courts for the disputes of nationals, namely, international arbitration; any stipulation whereby a citizen of a sovereign state relinquishes the right of that state to procure for him, through the international forum aforesaid, a remedy for his wrongs, is absolutely void and contrary to public policy.

As in municipal law no private contract can oust the municipal courts of jurisdiction to settle disputes between citizens, so in international law no private contract can oust the jurisdiction of the sovereign state to appeal to the only recognized international forum, arbitration or war, for the settlement of these disputes.

All this is so clear that even Mr. Barge, the umpire in the Orinoco case, admits it. In his decision of the Orinoco case he fails to give any reasons for his decision dismissing the case on the merits, because the company had been guilty of a breach of the 14th article, but in the

Woodruff case, in the same arbitrations, he says, in passing on the "no reclamation" clause:

Furthermore, whereas certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the government of that citizen to make international reclamation, whenever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party;

But whereas this does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges. (Woodruff case: Ven. Arb. of 1903, 160.)

He then concludes that the stipulation bars the claimant from successfully prosecuting the claim on its merits before an arbitration tribunal established by protocol for the very purpose of passing on and deciding it.

The first paragraph admits the absolute right of the government of the wronged citizen to disregard the no reclamation clause on his behalf; the second paragraph, while stating, it leaves untouched this right, puts the citizen out of court by reason of the existence of the no reclamation clause under conditions where the government, pressing his claim, has obtained an arbitration protocol and brought it before the arbitrators for adjudication on the merits.

In other words, although the clause is held to be not binding upon the government, yet when the government proceeds according to the only manner in which it can obtain for its citizen a remedy upon the claim, either by its insistence upon war or upon an international arbitration, and has obtained an arbitration, the clause is still valid to the extent of preventing the government from obtaining for its citizen on such arbitration any remedy founded on the merits of the case.

For a further decision of Dr. Barge in which he permitted the claimants to recover in spite of the no reclamation clause, see the case of Rudloff's (Ralston's Report, pp. 192-239). For a case in which he held that the clause precluded recovery unless on a judgment obtained in the local court, see the Turnbull case. *Ibid.*, p. 239.

The honorable umpire, Mr. Barge, further holds that all of these contract claims are barred because the assignment of them from the

Orinoco Shipping and Trading Company, Limited, to the Orinoco Steamship Company, never was notified to, or accepted by, the Venezuelan government. (Orinoco Steamship Co. case Ven. Arb. of 1903, 93.)

This ruling is had on the strength of his interpretation of certain provisions of the Venezuelan code which are alleged to give an assignee no rights until after notice of the assignment to the debtor.

The claim is founded on article 1496 of the Venezuelan civil code, which provides as follows:

An assignee has no rights against third parties until after notice of the assignment has been given to the debtor and when said debtor has agreed to said assignment. (*Id.*, 80.)

This is said to be substantially like article 1690 of the French civil code.

From this section the Venezuelan commissioner argued that Venezuela was entitled to look upon the assignor, the Orinoco Shipping and Trading Company, Limited, as the sole owner of the claims analyzed, and therefore the commission had no jurisdiction (*id.*, 81) and this argument met with favor from the umpire.

It is claimed by the counsel of the Orinoco Steamship Company, in his application to the United States government to obtain a reinvestigation of this claim on the ground of the invalidity of the award on its face, that the learned umpire, in so holding, acted upon a distinct mistake of fact, the record plainly showing to the contrary. (Protest of the Orinoco Steamship Co., in U. S. of America Department of State, 27.)

It may be added that on the face of the section quoted it would seem that the assignment takes effect when notice is given, and that the filing of this claim by the assignee in the office of the secretary of state and the presentation of that claim diplomatically and final arbitration upon it was a sufficient notification under the section.

The note from the French code quoted by the Venezuelan commissioner shows the true interpretation of this code to be that so far as the debtor is concerned, his only right to object is on the basis that up to the time of notice he is entitled to treat the assignor as the owner of the claim, a very proper legal rule. This to protect payments, etc., made

without notice. But this is a far cry from holding him entitled to defeat the assigned claim on the ground that the assignee is not the owner.

Thus, Baudry-Lacantinerie, in his note to article 1690 of the French civil code quoted as in point says:

The debtor, the claim against whom has been assigned, up to the time that the assignment has been notified to him, or that he has formally accepted it, the debtor, the claim against whom has been assigned, has the right to consider the ceding power as being the veritable owner of title of the debt.

This clearly shows that the object of the rule as to notification, so far as the debtor is concerned, is to prevent him from being liable twice both to the original owner and to the assignee.

The Fabiani Case

(French-Venezuelan Arb., 1902, Ralston's Report, p. 81.)

Antoine Fabiani, through France, presented claims against Venezuela aggregating 46,994,563.17 francs, extending over the years 1878 to 1893. (*Id.*, 111.)

These claims embraced two great divisions as they were afterward divided by the first umpire before whom they went for decision:

	Francs.
(1) For denials of justice arising from judiciary acts. . . .	4,346,656.51
(2) For denials of justice arising from executive acts (faits du prince).....	42,647,906.66
	46,994,563.17

The first class of claims involved seven claims on which damages were allowed by the first umpire to the amount mentioned. (*Id.*, 92.)

The second class of claims arose out of numerous executive acts, and involved claims arising out of the affairs of towage and of the railroad. (*Id.*, 107.)

The French government finally brought the claims to an international arbitration under the following documents:

The convention concluded February 24, 1891.

Re Fabiani's claims:

The government of the United States of Venezuela and the government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan government.

It will be the duty of the arbitrator:

First, to decide whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan government is responsible for the damages which M. Fabiani says to have sustained through denial of justice.

Second, to fix, in case such responsibility is recognized, as to allow part of the claims in question, the amount of the pecuniary reparation that the Venezuelan government must deliver to M. Fabiani, and which will be paid in bonds of the 3 per cent diplomatic debt of Venezuela.

The two governments have agreed to request the president of the Swiss Federation to kindly take charge of this arbitration.

The present declaration will be submitted to the approval of the congress of Venezuela.

Done in duplicate at Caracas, the twenty-fourth of February, one thousand eight hundred and ninety-one." (*Id.*, 110).

The "convention in force between the two contracting powers" was the treaty of November 25, 1885, which, after establishing diplomatic relations, contained a fifth article as follows:

Art. 5. In order to avoid in future everything that might interfere with their friendly relations, the high contracting parties agree that their diplomatic representatives will not interfere in the matter of claims or complaints of private individuals or on affairs cognizable by the civil or penal justice, according to local laws, unless the question is a denial of justice or judicial delays contrary to use or to law, the non-compliance with a definite sentence, or, finally, cases in which in spite of the exhaustion of legal remedies there is an evident infraction of the treaties or of the rules of the law of nations. (*Id.*, 111.)

When the claims were presented before the president of the Swiss Federation under the convention of February 24, 1891, Fabiani and the French government claimed that all his claims, including those arising out of denial of justice by reason of the judiciary acts, amounting to 4,346,656.51 francs, as well as those arising out of denial of justice by reason of executive acts (*faits du prince*) amounting to 42,647,906.66 francs, were included in the submission and were to be arbitrated on the merits.

The Venezuelan government, on the contrary, claimed that only the denials of justice in the technical sense of denials of justice arising from the acts of the judiciary were the questions before the arbitrator and the object of the litigation, and not the denials of justice based on these arbitrary executive acts, *faits du prince*. (*Id.*, 104.)

Thus their rejoinder before the Swiss arbitrator was:

It is absurd and monstrous, from a judicial point of view, to maintain that the party signatory of an agreement, or one of them, have had in view to settle a question outside of the agreement. The arbitrator can examine and retain only that which forms the object of the agreement.

Further:

As long as the signers of the agreement have not given to this accord a more extended scope, the only denial of justice that the arbitrator ought to examine is that which the cabinet at Paris says was committed after the sixth of June, 1882, mentioned in Article I of the protocol. Every other question is foreign to the agreement, and it can have no discussion upon the point of the departure of the litigation submitted to arbitration. (*Id.*, 104.)

The Swiss arbitrator agreed with the Venezuelan contentions, and held, construing the phrase "*denial of justice*" in the first clause of the convention of February 24, 1891, in its strict technical sense to mean only denials of justice arising through acts of the judiciary.

Thus he held:

It results, from the evidence of the very text of the agreement and from the ensemble of the facts of the case, that the respondent government is sued solely by reason of the non-execution by the Venezuelan authorities of the arbitral award rendered at Marseilles on the date of the fifteenth December, 1880, between Antoine Fabiani on one part, Benoit and Andre Roncayolo on the other part.

M. Lachenal adds:

In return, Venezuela does not incur any responsibility, according to the agreement, on account of facts foreign to the judicial authority of the defendant state. The claims which the petition bases upon *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely withdrawn from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he could not reserve them to establish other concluding and connected facts relative to the denial of justice." (*Id.*, 94.)

Thus, before the Swiss arbitrator, Venezuela, by her contention that denials of justice arising from the arbitrary acts of the executive were outside of the agreement of submission, and that only denials of justice in the strict sense of denials of justice by judiciary act were within it, was enabled to prevent an investigation of the merits, and a decision on the merits, of the claims arising from these arbitrary acts, *faits du prince*, by the Swiss arbitrator.

Later, a new convention was had between France and Venezuela for the submission of claims broad enough to include the surplus claims of Fabiani thus omitted from the consideration of the Swiss arbitrator, and Fabiani's case was presented to the new commission thus constituted.

Fabiani thereupon presented the surplus claims arising from denials of justice by arbitrary act of the executive, amounting to 42,647,966.66 francs, not passed upon on the merits by the Swiss arbitrator under the conditions above stated.

Thereupon Venezuela raised the claim that these claims were *res adjudicata*, and could not be re-investigated on the merits, and were barred by the decision of the Swiss arbitrator excluding them from his consideration.

The Hon. Mr. Frank Plumley, umpire, decided that the former decision was *res adjudicata* and a bar to the presentation of the surplus claims, and that France, by entering into the submission to arbitration, had surrendered all Fabiani's claims except those arising out of a denial of justice by an act of the judiciary.

Thus, without the merits of Fabiani's claims as to denials of justice arising from executive acts having ever been passed upon on the merits, the rule of *res adjudicata* was held to apply.

This in face of the recognized principle that in order for the rule of *res adjudicata* to apply, the subsequent litigation must be for the same cause of action (which was not the case here), and the former decision must be a decision on the merits (which was not the case here.)

Thus, also, the umpire held, that under a contract whereby France submitted certain claims for decision to an arbitrator, implying the intention that whatever claims were submitted should be passed upon on the merits and were not admitted by France to be unfounded, France relinquished her rights and the rights of her nationals to a major portion of these claims as entirely unfounded and thereby surrendered them. And this conclusion is reached because a subsequent clause in the instrument is construed to cut the general words "the claims" in the first part which are submitted for decision down only to a portion of the claims on which, by the latter portion of the document, damages can be awarded.

Thus, out of an agreement to submit alleged claims to a decision is evolved the implied surrender of the very claims themselves. And

this is done when the construction that the general words of the first part of the document are limited by the special words of the later clause so as to make the claims submitted by the language of the first portion cover only the claims which by the latter portion were to be passed upon on the merits, and thus construe the whole instrument together, was the natural and straightforward constructions that ought necessarily to have been adopted and which would have produced justice.

The decision, therefore, is upon its face a misapplication of the doctrine of *res adjudicata* and a misconstruction of the convention. It results in the absolute injustice of preventing a decision of the claims on the merits and allows the Venezuelan government to blow both hot and cold in regard to the same matters. For they claimed that the denials of justice founded on arbitrary acts of the executive were not before the Swiss arbitrator as being outside of the terms of the convention. In this they were probably technically right, if the words "denial of justice" in the first paragraph are strictly and technically construed. And then they come before the second arbitrator and in effect allege that the very issues as to the denials of justice arising out of arbitrary acts of the executive, which they had thus claimed were out of the purview of the first arbitrator's decision, have been barred by that decision.

As, therefore, these claims arising out of denial of justice based on arbitrary executive action are not the same causes of action as the denials of justice based on judiciary action, the merits of which were passed upon by the Swiss arbitrator, and as the claims based on the *faits du prince* were not passed upon on the merits by the Swiss arbitrator, it would seem that the decision of the Hon. Mr. Plumley is not to be supported on the ground of *res adjudicata*.

On investigating the grounds upon which he bases his conclusions, we find that the inequitable result arrived at has been accomplished by the adoption of involved reasoning based on a technical construction of a few phrases and words in the convention, omitting, from the arbitrator's purview the broad objects of the instrument, and, as it were, fixing his eyes upon one or two expressions and excluding all others from consideration.

His attempt through thirty-six printed pages of an opinion to give

tangible reasons for the inequitable results at which he arrives may be divided into two portions, namely, his *res adjudicata* ground, and his *compromise* ground.

His Res Adjudicata Ground

He argues that because the words "the claims" are used in the first portion of the instrument, therefore, "the claims" means the claims for denials of justice by acts of the judiciary and also the claims for denials of justice by acts of the executive.

The umpire also supports his decision on the ground that France released to Venezuela the claims arising out of *faits du prince*.

Hence the Swiss arbitrator passed on both classes of claims, because both classes of claims were submitted under the submission. Hence when he decided that damages were only to be had on the claims based on denials of justice by judiciary action, and dismissed the claims arising out of denial of justice by executive action, he passed on all the claims submitted to him, and hence there is *res adjudicata*.

We note that his argument nowhere asserts that that portion of "the claims" covered by the claims for denials of justice by executive acts have been passed upon "on the merits." But there is a sort of an implication, without the expression, throughout the verbiage of the opinion that they have somehow been passed upon on the merits so as to have the *res adjudicata* rule apply.

To put the argument in its strongest form. He argues that because the first arbitrator passed on them, holding them not to be a class on which he could give damages under the convention, and hence that he would not inquire into their validity, that hence there was a decision on the merits barring future action. But the umpire overlooks that such action of the Swiss arbitrator is not a passing on the merits of the claims on denials of justice for executive act. It is a mere determination that damages on any such claims are not submitted to the arbitrator for decision.

Hence that the merits of the claim are not submitted;

Hence that the claims are not submitted within the meaning of the convention;

Hence that there is no decision on the merits, and

Hence that there is no bar.

Every court in ruling that a claim is not before it for adjudication on the merits, must, in a certain sense, pass upon it. But this is not the kind of passing on it which the *res adjudicata* rule requires to constitute a bar.

Also every court in construing its power to decide under a protocol limiting its jurisdiction has to pass on the nature of the claims presented to determine what claims are before it for adjudication. But this is not such a passing as constitutes a bar when it decides that it can not, under the protocol, take into consideration the merits of a certain class of the claims.

For the rule requiring the merits to be passed upon before the *res adjudicata* rule applies to a bar a future action, allows an investigation into the former decision to discover whether the merits of the claim were actually passed upon. If not, the rule of *res adjudicata* does not apply.

It is evident, therefore, that so far as concerns the rule of *res adjudicata*, there was no circumstance before the court establishing such a former decision as would bring the case within the rule, and the decision is unwarranted on its face.

As to the compromise ground and alleged release by France to Venezuela of the claims arising out of faits du prince.

He arrives at this result by construing the convention to mean that France, in submitting "the claims" to the arbitrator and providing for damages only on claims arising from denial of justice, thereby released all other claims not arising from the technical definition of denial of justice.

The argument is that because France "agreed to submit to an arbitrator the claims of M. Antoine Fabiani," and then by the first article such arbitrator was "to decide whether * * * the Venezuelan government is responsible for the damages which M. Antoine Fabiani says to have sustained through denial of justice," that thereby all claims of Mr. Fabiani not within the technical meaning of "denial of justice" were released by France to Venezuela. In so construing the document, the umpire overlooks the general rule of construction that a document is to be construed as a whole, and the interpretation of general words in one portion of a document should be cut down to particulars, if necessary, by a future definition of the general words contained

in other parts. Hence the rational interpretation of the words "the claims" in the first portion of the convention as used in connection with the words "denial of justice" later on in the first article of the convention as defining the claims on which damages are to be assessed under the subdivision would require that the claims intended to be covered by the two dependent clauses should be the same in both instances, namely, the claims arising out of denial of justice by act of the judiciary—that being the definition given to the words "denial of justice" alone by the Swiss arbitrator. To rule otherwise is to rule the absurdity that the parties to this convention submitted the claims of M. Fabiani—those on which damages could be recovered, namely, the claims arising from the denials of justice by act of the judiciary, and those on which no damage could be recovered, namely, the claims arising from the denials of justice by act of the executive, to the arbitrator to be decided, meaning all the while to admit that the large class of the claims arising from the denials of justice by the executive so submitted to decision were then and there admitted by one of the parties to the arbitration agreement to be claims on which no decision could be made or was necessary thereunder and to be claims on which no damages could be awarded thereunder and that the result of so submitting them to decision by the arbitrator was to then and there admit them to be utterly groundless and to release and discharge them forever.

Truly, a most remarkable construction to place upon a convention submitting claims to arbitration.

Mr. Plumley dwells on the words "the claims" and interprets them to mean "all claims." Accepting then the construction of the Swiss arbitrator that the further provisions of the convention allowed him to find damages only on claims arising from denials of justice by act of the judiciary, he thence argues that all claims for damages arising from denials of justice by act of the executive are waived and released. But if the learned umpire is to be allowed to twist the words "the claims" to mean "all claims" and thence by verbal gymnastics to discover a release of "the claims" in the very agreement which submits "the claims" to arbitration, certainly, we are entitled to extract the meaning of the parties from the further language they have used and to dwell upon the necessary meaning of the words "to submit to an arbitrator" likewise used in the convention. For surely this language

does not mean that France, one of the parties to this submission, by submitting "the claims" "to arbitration" thereby in the very act admits that three-fourths of "the claims" so agreed to be submitted to the arbitrator are irrecoverable; and thereby, in the very act of submission made by said document, forever releases the said claims to the other party to it. Yet, this absurd construction of an agreement to submit claims to arbitration is the practical effect of the learned umpire's conclusion.

The convention speaks of the claims in only two places; it says, the government

has agreed to subject to an arbitrator the claims of M. Antoine Fabiani,
 * * * it will be the duty of the arbitrator, first, to decide whether
 * * * the Venezuelan government is responsible for the damages
 which M. Fabiani is said to have sustained through the denials of justice.

It is clear, therefore, since only damages "sustained through denials of justice" are to be passed upon by the arbitrator that "the claims" submitted to decision are only "the claims" for "damages sustained through denials of justice." And when "denial of justice" has been construed to mean "denial of justice by act of the judiciary alone," then "the claims" through "denial of justice by act of the executive" are not included in the submission. To get at the alleged release and bar the learned umpire has, first, to construe the words "the claims" to mean "all claims." A stretch of interpretation strangely gratuitous and unwarranted under the circumstances. Having made this gratuitous change in the document, he then construes a submission of all claims on which the arbitrator is to pass as to damages, on only a part of them to be a release of the balance of the claims. Truly, a remarkable construction to place upon a document which on its face shows that whatever claims are submitted to the arbitrator are claims which are to be passed on their merits. For certainly an agreement to submit claims to an arbitrator is not an agreement admitting that the claims so submitted are invalid and are thereby released. For how under any sensible construction can it be claimed that France can be construed to release "the claims" she submits to decision, when she thus expressly says that she submits them to be decided. Hence "the claims" must be construed in connection with the claims on which damages are to be assessed arising from denial of justice mentioned in paragraph first. Being so con-

strued they must be restricted to all claims which the definition of the balance of the document shows were actually submitted for decision, namely, claims arising out of denial of justice by act of the judiciary.

Then by hair splitting and word twisting certain claims, apparently just because not met upon the merits before either tribunal by Venezuela, have never been investigated upon the merits and are held to be barred or released. This inequitable result is arrived at when the ruling should have been that the convention of February 24, 1891, covered such claims only as were submitted for decision, that is, for decision on the merits. For it would be strange to hold that the parties intended to submit claims for decision except to decision on the merits, that is, viewing their general and fair intention in the premises that the Swiss arbitrator had authority to determine what claims were so submitted under the convention.

When he held under the words "denial of justice" that only claims arising from denial of justice in its strict and technical sense, namely, denial of justice through judiciary acts and not through acts of the executive as intended the general words "the claims" of the first part of the contract became at once limited by implication to "the claims" arising from denial of justice by judiciary act.

There were nine of them in existence, and hence "the claims" was a proper definition. Hence the claims of M. Fabiani arising out of denial of justice by executive act were not passed upon by the Swiss arbitrator or even investigated for the purpose of passing on their merits; and that decision can be no bar.

Thereupon a decision on the merits in the second arbitration could have been had, and justice done, if justice lay that way. For certainly no justice is done where no attempt is made to pass upon the merits of the claims.

The umpire concludes his elaborate opinion with the following words:

On a careful review of the history of this claim from its origin to this date, enlightened by study and reflection, fortified in principle, and controlled by reason, responsive to his conscientious conception of duty, the judgment of the umpire is clear and positive;

that under the agreement of February 24, 1891, the Swiss award is a bar to the present claims submitted.

Qui s'excuse, s'accuse.

CONCLUSIONS

The foregoing examples have been given for the purpose of bringing to the attention of the reader the mistakes, the absurd errors, the gross blunders and the actual corruption amounting to a travesty on justice which have occurred in international arbitrations of private claims under the present system of constituting those courts as occasion arises. If such miscarriages of justice have occurred in international arbitration of private claims, what shall be said of the possibilities or probabilities of like results in the international arbitration of public questions.

On the one hand in the arbitration of public claims there is greater danger of such failures arising from the following causes:

We there find the disturbing influence of national patriotism, international associations, friendly or inimical, history and environment, personal prejudice, or trends of affection or feeling and the natural bias arising from one or more of these affecting the minds of the arbitrators.

On the other hand, in the arbitration of private claims there is greater danger of such failures arising from the fact that the personnel of such commissions is usually less carefully chosen than in the case of public claims.

In citing instances to prove miscarriages of justice in international arbitrations, and thereby to prove the present defects in the system arising out of the absence of a permanent court constituted of judges having fixed tenure of office and fixed salaries, we purposely refrained from calling in question the justice of the decisions in the cases involving the great public questions. This because aside from the prejudice and passion apt to be encountered in dealing with such questions, the mere task of proving the injustice of any such decision in any one instance, even if the writer were successful in the effort, would require volumes for its proper presentation.

Witness the large octavo volume, entitled *The Neutrality of Great Britain During the American Civil War*, by Montague Bernard (Longman & Green, 1870), written to prove under the doctrines of international law the exact contrary of the decision of the arbitrators in the case of the *Alabama* award.

The numerous inequities—to call them by no harsher name—the glaring instances of injustice which have occurred through the

decisions of arbitrators on international private claims indicate a startling weakness in the character or the constitution of those tribunals, and have been a source of much criticism and dissatisfaction.

The cases above given have been cited to prove not that international arbitration is a failure, but that, as practiced at present, its guarantees of the probability of a just result are, in the light of experience, not sufficiently certain to lead statesmen to submit many great questions to such means of settlement.

As the cause of the persistence in municipal law of private war and trial by battle as solvents of the disputes of men against the competing institutions of trial by jury or court was the frailty of human nature arising out of perjury in witnesses, leading to impositions upon the court and unjust decisions, so the cause of the persistence in international law of public war as a solvent of the disputes of nations against the competing institution of international arbitration may be sought in the frailty of men arising out of the ignorance, the lack of a just balance, or the corruption of international arbitrators leading to unjust decisions.

THE REASONS FOR THE FAILURES OF INTERNATIONAL ARBITRATION UNDER THE PRESENT SYSTEM

The reasons for the failures of international arbitration are not far to seek.

As to private claims the defects have been—

(1) The careless selection of unfit judges. Usually comparatively obscure lawyers are appointed as commissioners. This is done as a reward for political services or by reason of family connections. They are generally men unskilled in the doctrines of international law—a branch of law distinct in itself, and needing careful preparation and study to master its intricacies.

(2) The courts so selected and constituted have been of evanescent and fugitive character, created for the decision of one or more special claims, and dying with the decision of the dispute or disputes so submitted. The result has been great contradiction in their rulings. Witness the contradictory decisions in the Venezuelan arbitrations of 1903 as to the validity or invalidity of the no reclamation clause in Venezuelan contracts.

Mr. Barge, the umpire of the American Venezuelan arbitrations of

1903, decided the no reclamation clause to be valid. (Re Orinoco Case, Ven. Arb., 1903, 73, 92. Turnbull Case, *id.*, 201, 204.) While Mr. Plumley, the umpire in the British Venezuelan arbitrations, and Mr. Ralston, the umpire in the Italian Venezuelan arbitrations, decided that the clause is invalid. (Selwyn Case, Ven. Arb., 1903, p. 322; Martini Case, *id.*, pp. 819, 841.)

Under such circumstances with changing courts and changing personnel no law of precedents can be consistently developed.

Thus one great and valuable fountain for the growth and establishment of a body of international law along lines of consistent growth and expansion, such as has made the English common law worthy of the phrase applied to it by its most enthusiastic champions "the perfection of human reason," is lost without compensating benefit.

(3) Such personal bias as may exist through racial or national feeling or environment. In these cases this is almost a negligible quantity.

(4) The absence of a fixed tenure of office and fixed salary. This essential, recognized as an absolute essential in our constitution of the municipal courts, is absent, and the courts so established to this extent imperfectly constituted.

As to public claims, the defects have been—

(1) In these cases the selection of judges is usually made with greater care than in the case of private claims. But objection may still be made in some instances on the same grounds as stated in regard to the judges selected for the arbitrament of private claims.

(2) The ephemeral and fugitive character of these courts as now constituted is here one of the greatest drawbacks to the adoption of the system.

(3) The personal and national bias arising from birth, history and environment is here of commanding importance. Some publicists have insisted that for this very reason no national of the nations interested in the litigation should sit as an arbitrator on such a tribunal. In this, for reasons not explainable in the space here afforded, we do not agree.

(4) The absence of a fixed tenure of office and fixed salary. The lack of this essential has been repeatedly insisted upon as the prime defect in the courts as now constituted.

THE REMEDY

How, then, can these defects be cured, and how can the system be improved? The answer lies in the answer to another question.

What are the essential qualifications of a judge? We answer—

- (1) Honesty;
- (2) Intelligence, which includes learning and sound judgment;
- (3) Impartiality.

To obtain these things we should select men of proved probity, of evident skill in the art involved, and having the least possible bias of personal character or judgment, men of sound and well balanced minds as distinguished from men of idiosyncratic ideas.

To obtain this impartiality, which Socrates placed as the last and crowning attribute of the four virtues of a judge, we, according to our practice in municipal law, remove him, as far as possible, from wordly cares and temptations. This is done by making his position and salary permanent—a life tenure during good behavior. Two objects are thus accomplished. His court is made a permanent court thus allowing the full operation of the rule of *stare decisis* and the effects of his decisions are not visited upon him.

How difficult it is for an international arbitrator to decide public questions contrary to the views of his co-nationalists and their side of the dispute.

In the case of a late arbitration between the United States and Great Britain in the issues of which the Canadians were vitally interested the great reputation for wisdom and honesty of the chief justice of England who agreed with the American arbitrators in holding against the Canadian contentions, thereby casting the vote necessary to make the award, did not suffice to protect him from the most bitter attacks on his motives and character. Imagine his position had he had to look forward (after rendering his decision) to going back to living, and making his living, in Canada.

What we have done, therefore, to make our judges in municipal law superior to the accidents and circumstances of life in order to make them impartial, we must do for our judges in international arbitration.

In international, much more than in municipal disputes, the prejudice and bias from our surroundings, associates, history and environment are apt to sway the minds and pervert the judgments of good men trying to be just judges.

For all the greater reason, therefore, should we in international affairs do at least as much as has been done in municipal affairs to remove, as far as possible, these causes of possible failure of international arbitration as a system for the settlement of international disputes.

Permanent life tenure of judges during good behavior is the personnel demanded, therefore, for an international court of arbitration. This necessitates the creation of a body of jurists who shall be made independent as the United States supreme court is independent. In other words, the Hague tribunal should be a permanent court of limited number with salaries sufficient to attract men of distinction and ability to accept appointment to the court.

A PERMANENT COURT OF FIFTEEN JUDGES SHOULD BE ESTABLISHED
AT THE HAGUE

In the Hague tribunal of the present day we have a tribunal which can easily be modified into an international court of arbitration having the proper characteristics suggested.

As at present constituted, this tribunal consists of a list of fifty judges nominated up to 1900 and as four can be nominated by each of the twenty-six signatory powers, the total number possible is one hundred and four. As so constituted, the number is entirely too large for such a court to sit as a court and do practical work.

As it is desired to change this into a permanent court of limited number, it is necessary to do so by a process of exclusion. In effecting this result individual interests of individual nations must be sacrificed for the public good.

While the doctrines of ideal justice demand an equality among nations as they do an equality among men, the relative conditions of the world necessitate a different treatment of practical questions if practical results are to be accomplished. The difficulty with all international congresses lies in the fact that the first class powers of the world, the great nations, see in such gatherings, where big and little nations have the same equality of one vote, danger to their special interests arising out of the fact that the comparatively weak are thus able to impose their will upon the comparatively strong. This reversal of the conditions existing in the world at large outside of the walls of such a congress is one to which the great nations will naturally not tamely submit—when any important issues are at stake.

The value in a court of international arbitration lies in its ability to enforce its decrees even against an unwilling disputant and defeated litigant. The power to accomplish this must spring from the powers as they exist in the outside world, that is, from a combination of the great nations pledged to enforce the court's decrees.

The preponderance in worldly affairs of the great nations, therefore, must be recognized and given effect in such a tribunal if the tribunal is to have the respect, the confidence and the backing of the great nations. This is practical common sense, and however far from the ideal of the theory of the establishment of such a tribunal facts as they are must be recognized in its constitution if its constitution is to be relatively fitted to its environment.

The suggestion, therefore, is that each of the first class powers of the world signatory to the Hague convention, be given the appointment of one member of the proposed great tribunal. Thus, for example, Great Britain, Germany, Russia, France, the United States, Austria, Italy, Spain, Turkey, Japan and China, would have one member each, making eleven judges. The smaller and less powerful nations would be represented upon the tribunal by a system of representation. Thus let the smaller European states, such as Norway, Denmark, Belgium, Switzerland, Greece, etc., select two members, and let the remainder of the signatory powers, Mexico, Persia and Siam select two members.

We would then have a court constituted with fifteen members, a membership not too large in view of the important questions involved. For the decision of any case, even the smallest, might affect immense interests that might thereafter come up to be decided under the rule of international law thus invoked and applied.

With the benefit should go the burden. So each country should pay the salaries of the judges and the expenses of the court based on its proportionate membership in the total membership of the court.

In order to prevent possible lapses from grace of the constituent members of the court in carrying out the proposed plan, each sovereignty should contribute to a principal fund a capitalized amount whose income would be sufficient to meet its proportionate share of the expenses of the court in perpetuity, or until further provision should be required. Proper arrangements should be made for the proper investment of this fund and the auditing of the same.

It is deemed that a proper salary for the members of this court

should not be less than the salaries received by the justices of the supreme court of the United States or of the supreme court of New York. The salary of the chief justice of the supreme court of the United States is \$13,500 per annum and that of the associate judges, \$12,500 per annum. The justices of the court of appeals of New York receive as follows: Chief justice \$10,500 per annum, and associate judges, \$10,000 per annum, with allowance of \$2000 apiece for expenses. We suggest, therefore, that a proper salary for the judges of the permanent court of international arbitration at the Hague would be \$15,000 per annum. To this might be added \$2500 or \$5000 for clerks and incidental expenses, or say \$20,000 for each judge. With a staff of fifteen judges the total expenses of the personnel of the court would be (say) \$300,000 per annum. An expense which would, however, be an expense of only \$20,000 per annum for each signatory power appointing a judge.

Through the princely gift in 1903 of \$1,500,000 by Andrew Carnegie, a private citizen of the United States, for the establishment and maintenance of a proper court house and library for the Hague tribunal the nations of the world are relieved from that increment of expense, and only the salaries of the judges and clerks need be provided. The world's highest court so constituted, would then cost the United States of America the small sum of \$20,000 per annum.

We now pay the United States ministers to each of the great powers, such as Germany, Great Britain, etc., a salary of \$17,500 per annum, and surely the United States of America and each of the other great nations of the world could find no excuse for failing to contribute this comparatively nominal amount to the maintenance of this imposing court.

In the fiscal year of 1905 the powers spent on their armies, as follows: Russia, \$185,000,000; Germany, \$157,000,000; Great Britain, \$153,000,000; France, \$133,000,000; United States; \$112,000,000; India, \$98,000,000; Austria, \$84,000,000; Italy, \$55,000,000; and Japan, \$21,000,000.

In 1906 the United States expended on its army and on its war department, \$93,659,462. On its navy department, \$110,956,107.

On the twenty-eighth day of February, 1907, Lord Tweedmouth, the first lord of the admiralty in reporting to parliament gave the

naval estimate for the British navy for 1907 as \$40,500,000, for new construction as against \$46,175,000, for 1906.

With such enormous sums annually spent and under existing circumstances properly spent, by the nations of the world in maintaining their armaments, surely no nation could object on the score of economy to contribute its pittance of \$20,000 a year to the good work of establishing and maintaining a permanent court of international arbitration and thereby advancing the cause and prospects of international arbitration as a substitute for public war.

Hence the objection to this plan that it would be a costly experiment is too trivial to be entertained for a moment. A single decision in the first case referred to the tribunal avoiding the war that might otherwise have arisen would save enough money as compared with the cost of that war to run the court for many years. For instance: take the arbitration at the Hague over the question whether the claimed preference of the blockading creditor nations of Venezuela over the pacific creditor nations in the payment out of the customs receipts of that country, was proper under the circumstances. Had that question been submitted to the arbitrament of a general European war, the cost would have been incalculable; not to mention the crime against civilization which would have been thus perpetrated.

As we maintain a great navy in idleness and rightly do not count the cost in view of its priceless value at the crucial moment, so should we maintain, if necessary, a great international court in idleness, if you please, so that it shall be ready for action at the crucial moment and thus prevent the war that might otherwise arise. The cost is therefore a negligible quantity. It would be expensive, but war is so much more expensive that the two are not to be mentioned in one breath. As well weigh a mote against the moon.

Again, the advantage of having a court fully organized prepared and ready to do business, and which, in the course of time, through its wise decisions, would obtain a hold upon the imaginations of men—not possible in the case of a fleeting, evanescent tribunal, would be an inestimable advantage.

Men are so prone to take the line of least resistance.

Again, such a permanent court would soon begin to develop an international law of precedents whose value, as a mode of settling

disputes without recourse either to war or arbitration, would be priceless.

And as in the case of municipal law when the court makes a wrong departure—wrong in the eyes of the legislature—a statute remedies the defect; so if decisions were made offensive to the sense of justice—or interests—of the great nations—a council of the great nations could change it by resolution; or any particular nation may refuse to arbitrate before the court except pursuant to a protocol eliminating the objectionable ruling.

Thus and thus only will be obtained the nearest approach to human perfection in the establishment and maintenance of a system of international arbitration.

Pending the realization of this great end, public opinion should be educated to stigmatize as a crime the appointment on an international arbitration of any but the most highly trained experts—men fitted in every sense duly to discharge the important duties of their high office—men of sound sense and well balanced minds—men, in a word, of the true judicial temperament.

A PROSPECT

As perjury was the drawback to trial by jury which rendered possible the survival of private war and its daughter, trial by battle, far into the Middle Ages, and up to a time whose civilization was otherwise unfitted for its continuance, so unfit men as arbitrators and the evanescent character of the courts so constituted are the drawbacks which are now weighing heavily against international arbitration in its struggle for existence against public war.

All lovers of peace and humanity who desire that in this struggle between two institutions the system of international arbitration shall ultimately survive, must lend their energies to the establishment of that system upon the best possible foundations in order that it shall become the fittest to survive in the environment.

The Hague tribunal is a great advance. But, as shown, it is defective as now constituted. It needs to be reorganized and made a permanent tribunal in the manner suggested.

Let us then have a permanent court at the Hague and always open for business, composed of a limited number of judges with fixed tenure of office during good behavior and fixed salaries, residing at the Hague.

Let private claims be submitted to this tribunal as a matter of course on the suggestion of the chancelleries of the nations interested. What divinity doth hedge about a king? Why should not sovereignties answer at such times and places for their alleged misdeeds?

Let this court be ready at all times for the hearing and decision of great public questions when and as submitted by the sovereignties involved in them.

So will be constituted a true permanent court of international arbitration, a true international judiciary from which will spring a true system of international law.

R. FLOYD CLARKE.

THE GENEVA CONVENTION OF 1906

The members of the congress of Vienna who, for the most part, directed the international politics of Europe for the first half of the nineteenth century, have never been accounted as exponents of liberal thought, or as the advocates of liberal policies. But it must be said in behalf of their narrow and, at times, reactionary statesmanship, that it kept the peace in western Europe during the period intervening between the battle of Waterloo, which terminated the military and political activity of the first Napoleon, and the appearance of his nephew in the rôle of a military commander in the Italian campaign of 1859. For the first time in recorded history it was given to the harassed inhabitants of the Rhine provinces to see a full half century of peace, and to enjoy so much as fifty years of fortunate and uninterrupted immunity from the hardships and sacrifices of war.

The operations in the Crimea, which abounded in inefficiency and mismanagement, had been carried on in a distant and inaccessible region, but the theater of the campaign of 1859 was in northern Italy, an area so accessible from all parts of western Europe that it instantly filled with curious observers, who desired to see at first hand something of the actual operations of war. They were not disappointed. The casualties were not excessive, but the spectacle of the bloodshed and desolation of war was new and unfamiliar. The fields of Magenta and Solferino were strewn with dead and wounded; the diseases incident to the movements and operations of large armies abounded; the surgical and hospital staffs were inadequate in point of numbers and equipment, and were otherwise badly supplied and obviously unequal to the task of caring for the enormous numbers of sick and wounded who were thrown into their hands for medical and surgical treatment. Anesthetics had not yet found a place in the official medical supply tables; antiseptics and antiseptic surgery were still to be invented and perfected; and the charitably disposed found abundant opportunity to assist the medical and hospital staffs in relieving the sick and caring for the wounded.

Two philanthropic citizens of Switzerland—Gustave Moynier and Henri Dunant, both men of high executive ability and widely experienced in relief work, were among the first to arrive in the field, and instantly addressed themselves to the task of organizing and coördinating the well disposed but unskilled activities of those who were willing to assist in caring for the sick and wounded; and it was out of the experience gained by these two philanthropic workers that the first Geneva conference came into being.

The Geneva conference of 1864 thus marks, in a sense, the revival or renewal of military activity on a large scale, to which the people of western Europe and the new countries beyond the sea had not been accustomed since the first Napoleon had been eliminated as a factor in European politics. It was also the direct outgrowth of the short but sanguinary war, waged in behalf of Italian unity which, in the language of the French emperor, was to free Italy from the Alps to the Adriatic. But the object lessons in human suffering were not alone sufficient to fix public attention upon the need of concerted action, for to these were added four years of agitation and awakening of public opinion before the matter was taken up by the federal council of Switzerland and the call for an international conference was accepted by the powers.

It is an error to suppose that the work of the first Geneva conference was in any sense a discovery. The convention of 1864 may be said to have fairly represented the best existing practice among continental armies in respect to the management and control of the sick and wounded, and in the immunities which were habitually accorded to the personnel of the medical and sanitary services who were charged with their care and treatment. That convention embodied, in the form of an international agreement, the practice which had theretofore rested upon customs and usage, and derived its obligatory force from the implied consent of the states which accepted and applied them in the conduct of their military operations. To accomplish this, the framers of the old convention attempted to apply the principle of neutrality to the sick and wounded, and to the personnel and matériel of the sanitary establishments which habitually accompanied the operations of armies in the field.

In the march of improvements in medicine and surgery, the interval which separates the Italian campaign of 1859 and the Manchurian

operations of 1904 is vastly greater than that which separates the medical service of the great Frederick from that of the third Napoleon. The Geneva conference of 1906 recognized that anesthetics, antiseptic surgery, sterilization, the hospital ship and the hospital train, were essential incidents in the modern treatment of wounds and in the prevention of camp diseases. The framers of the old convention adapted their work to existing needs; they knew that the wounded soldier was not a neutral, and in applying the term to the sick and wounded in time of war they were attempting to describe the immunity to which they were entitled, and the consideration which they desired should be shown to the victims of wounds and disease.

In the new convention much of the inexactness of expression which characterized the old undertaking has been eliminated. Descriptive words and phrases have been brought into close and exact relation with the conditions of modern science and the operations of modern war. The terms "neutral" and "neutrality," as applied to the immunity granted to those charged with the care and treatment of the sick and wounded by the convention of 1864, have been replaced by words and clauses which define their status with the greatest accuracy. The term "neutral" is used throughout the new convention in the sense attributed to it in statutes and treaties and in the works of text writers of standard authority, and is restricted, as will presently appear, to cases of internment and to the personnel of volunteer aid societies, organized under the authority of neutral states, which tender their services to a belligerent in time of war.

The terms used to describe the status of the sick and wounded and the personnel and matériel of the sanitary establishments in which they are entertained and cared for have a clear and unmistakable meaning; and are calculated to conduce to efficiency and certainty of execution; indeed, it is difficult to see how they can give occasion for variance in interpretation.

Throughout the treaty the term *sanitary formation* is applied to all establishments, whether fixed or movable, which are provided by public appropriation or private charity for the treatment of the sick and wounded in time of war. To each of the movable sanitary formations a surgical and administrative personnel is attached; tents, bedding, ambulances and other means of transportation are provided, together with a sufficient equipment of surgical instruments and medi-

cal and hospital supplies. To the personnel and matériel, constituting such a movable sanitary formation, the quality of inviolability is attached by the terms of the convention, and, in the event of its falling into the hands of the enemy, the entire establishment, when its sick and wounded have been evacuated or transferred to base hospitals, is required to be returned to the lines of its own army, with the least practicable delay.

The commanding general of the belligerent forces into whose hands such an establishment falls is charged with the performance of this duty, but is permitted to exercise a reasonable discretion in respect to the time when, and the method and route by which the restoration shall be accomplished. While it remains in the hands of the enemy its administrative personnel continue in receipt of the pay and allowances which are assigned to their respective grades in the service of the belligerent in whose hands they are; upon their return to their own lines, they are permitted to take with them their private property, including horses, personal baggage, and such arms as are habitually carried by them in active service. A similar immunity is granted the official personnel of a movable sanitary formation which has been placed at the service of a belligerent by a volunteer aid society.

When a belligerent finds it necessary to furnish a guard for the police protection of a hospital or other sanitary establishment, the individuals composing it, in the event of its capture, are returned to the lines of their own army, with the personnel and matériel of the sanitary formation, without becoming prisoners of war.

What has been said in respect to the personnel of the movable sanitary formation applies with equal force to the medical staff employed in the buildings, hospitals, and other fixed establishments which pass into the occupation of the enemy as a consequence of his military operations. If the matériel in possession of such establishments is the property of the belligerent state, such property, including the buildings in which it is installed, becomes subject to the laws of war, and, as such, is liable to capture, but with the express condition that it must not be diverted from the use to which it has been assigned or appropriated so long as it is necessary for the treatment and accommodation of the sick and wounded. If the matériel furnished by volunteer associations, which enjoy the benefits and privileges of the convention, is found in such fixed hospitals, upon their occupation by

the enemy, the convention provides that it shall be regarded as private property and, as such, shall be subject to the right of requisition as recognized by the laws and usages of war.

The new convention contains a stipulation that the protection accorded to the personnel of all sanitary formations is forfeited if acts of hostility are committed, save in individual self-defense or in the protection of the sick and wounded in its charge. It was for this reason that the clause recognizing their right to carry arms was inserted in the convention. The mere fact that arms, cartridges, or other articles constituting the war equipment of troops in active service are found in the possession of individuals, or in the storerooms of fixed or movable hospitals, does not confer a hostile character upon such establishments nor deprive the individuals in whose possession they are found of the benefits conferred by the convention.

The privileges conferred upon volunteer aid societies by the terms of the convention are not only extremely liberal, but are in harmony with the most advanced humanitarian views in respect to the treatment of the sick and wounded in time of war. To enable such an association to take part in relief work in the theater of active military operations, it is necessary that it should receive the formal recognition of its own government; the fact of such official recognition being communicated by that government to other states, either in time of peace or prior to its being employed in the theater of active operations. While employed in the field the personnel of such societies becomes subject to the control and supervision of the belligerent in whose service its aid is rendered.

If a volunteer aid society, established and authorized by a neutral state, desires to render aid to either belligerent, it can do so by first obtaining the consent of its own government and the authorization of the belligerent whom it desires to serve. The belligerent accepting the services of a neutral aid society is required to notify the enemy that such authorization has been accorded.

The details of organization of these societies, together with the preparation of regulation governing their activity in the field and fixing their relations with the sanitary department of the army, were wisely left to the discretion of the individual powers. It is proper to observe, however, that the furnishing of relief by such associations to communities suffering in time of peace from pestilence or famine, or from the

visitation of floods, fires, or earthquakes, will always constitute a proper subject for their humanitarian endeavor; and the use or display of the insignia of the convention upon such occasions does not come within the prohibitory requirements which are embodied in articles 27 and 28 of the new convention.

It was the sense of the conference that the field of activity of these societies should be restricted to the second line of sanitary formations, and to the fixed hospitals established at the bases of supply, in which the sick and wounded are habitually collected for permanent treatment; but, as the control and supervision of their philanthropic activity is vested by the terms of the convention in the state which authorizes them, it was not deemed best to insert such a stipulation in the text of an international agreement.

The convention of 1864 was silent as to the status occupied by the sick and wounded who, by the vicissitudes of war, pass into the control and possession of the enemy. This defect, which is a very important one, is remedied in the new agreement by a clause providing that at the instant of capture the sick and wounded pass into a status of captivity, and thereby become entitled to the benefits accorded to prisoners of war by the generally accepted rules of international law. They also become entitled to the privileges and immunities which are expressly conferred upon prisoners by the terms of the Hague convention of 1899.

The requirements of the new undertaking, in respect to the consideration to which the sick and wounded are entitled, are clear and specific, and include within their scope not only the combatant members of the military establishment, but such noncombatants as habitually accompany the army in an official capacity. All these are required to be collected and cared for, without regard to nationality, and this duty is made equally incumbent upon both belligerents by clauses which charge the occupant of the battlefield with the duty of caring for the wounded who have fallen in battle, and require a retiring belligerent to make reasonable provision for the care and treatment of the wounded who are left behind. These clauses are very broadly stated, and are intended to apply not only to the case where a successful belligerent occupies the battlefield, but also to a case in which both of the opposing armies occupy new positions at some distance from the field in which the losses were incurred.

After each combat the occupant of the field is required to take the necessary measures for the protection of the wounded and the examination and identification of the dead. To that end all individual medals, or tokens, together with all letters, valuables, and personal belongings found upon the field or upon the bodies of those who have fallen in battle, are to be collected and transmitted to the lines of the enemy. The names of the sick and wounded who have fallen into the hands of the opposing belligerent, or who have been admitted into his hospitals for treatment, and who have recovered or have died, are also to be forwarded to the enemy's outposts with a view to their transmission to relatives and friends.

Authority is vested in the commanding generals of the opposing armies to enter into cartels for the immediate return of the wounded to their own lines at the close of the battle, and to repatriate the sick and wounded when they have so far recovered as to be able to undertake the homeward journey. They may also send them to a neutral state for treatment and internment, with the consent of the neutral government, but upon the condition that the internment shall continue until the close of the war.

The important question of convoys of the sick and wounded is made the subject of detailed regulation in the new convention. If a moving convoy is intercepted by a belligerent he is authorized, if such a course is dictated by military necessity, to take possession of the means of transportation in which the sick and wounded are being conveyed to their destination. In so doing, however, he charges himself with the care of the patients who are undergoing transportation, and must return the official sanitary and administrative personnel and matériel to their own lines with the least practicable delay. Ambulances and other vehicles, together with hospital trains and steamers, which have been especially fitted for the transportation of the sick and wounded, are to be returned to the army to which they belong, but while in the possession of the enemy are to be used exclusively for the accommodation of the sick and wounded. Means of transportation belonging to a belligerent, but not specially fitted for hospital uses, are subject to capture; and vehicles obtained by requisition, including ordinary railway trains and river boats, or commercial vessels temporarily utilized for the conveyance of the sick and wounded, together with the drivers, or other employees, necessary to their

management or use, are made subject to the operation of the laws of war.

The appeal to the charity of the inhabitants of occupied territory in behalf of the sick and wounded which was embodied in the convention of 1864, but which was found to be so impracticable in its application as to require substantial amendment in the agreement of 1868, has been replaced by a provision, more completely in harmony with existing conditions, which authorizes commanding generals to appeal to the charitably disposed inhabitants of the theater of war to collect and care for the sick and wounded, and authorizes them to promise special protection and an immunity from the removable hardships of war to those whose favorable acceptance of the appeal is evidenced by efforts to ameliorate the lot and relieve the suffering of those who have been disabled by wounds or diseases.

It was also recognized that the methods which now prevail in the treatment of the sick and wounded no longer permit their isolation in scattered dwellings and outbuildings, which are difficult of access and in which sanitary conditions cannot be controlled. For that reason the collection of patients in tents and suitable hospital buildings, under the most advanced conditions in respect to sanitation and antiseptic treatment, was strongly favored by the conference.

The employment of the insignia of the convention was made the subject of careful and extended treatment; this with a view to prevent its abuse and restrict its use to the personnel and matériel to which its protection is intended to be accorded. The heraldic sign of the red cross upon a white ground was recognized and continued as the emblem and distinctive sign of the sanitary service of armies in the field. The use of the term "heraldic" in describing the insignia of the convention excludes the view that any religious association attaches to the distinctive emblem of the convention's philanthropic and humanitarian activity. Turkey was not represented in the conference, and it is worthy of note that the representatives of Japan, China, Persia, and Siam expressed a willingness on the part of their governments to accept the red cross as the official insignia of the convention.

The convention contains a provision that the emblem of the red cross shall be exclusively used, both in time of peace and war, to designate the personnel and matériel of the sanitary formations which it is

the purpose of the convention to protect. It also provides that, in the event of capture, the flag of the convention shall alone be displayed, so long as the sanitary formation which it protects remains under the control of the enemy. With a view to prevent the usurpation or abuse of its name or insignia, especially in the form of trade-marks or commercial labels, the signatory powers whose legislation in this regard is insufficient, agree to take, or to propose to their respective legislative bodies, such measures as are necessary to secure to the name and emblem of the convention a complete immunity from abuse. As considerable time will be required for the preparation and adoption of legislation of the kind above described, the convention contains a clause requiring the signatory powers at the end of five years from its date of signature to communicate the results of their efforts in this regard to the general council of the Swiss confederation.

The convention also contains an undertaking that the signatory governments shall take the necessary measures to instruct the personnel of their military establishments in the detailed application of its rules to the care and treatment of the sick and wounded who are made the subject of its several stipulations. They also agree to bring a knowledge of the scope and operation of the convention to the attention of their respective citizens or subjects. The propriety of this is obvious.

The suggestion that the rules governing the care and treatment of the sick and wounded in maritime warfare should be brought before the conference for discussion, with a view to their adaptation to the conditions of modern naval warfare, was informally discussed with the representatives of several of the great maritime powers. It was found that but two governments—the United States and Japan—were represented by naval delegates, and that none of the delegations felt justified, in view of their instructions, in entering upon the discussion of the application of the rules of the Geneva convention to maritime warfare, without further advices from their respective governments, and without the presence and assistance of naval representatives in any discussion which might arise. For that reason, and as the question is one which will probably be inscribed upon the programme of the second peace conference, further consideration of the subject was not insisted upon.

GEORGE B. DAVIS.

THE DEVELOPMENT OF INTERNATIONAL LAW¹

In his letter asking me to make the opening address this morning, the secretary of the Society describes the topic as "The Second Hague Conference and the Development of International Law as a Science."

There is certainly nothing small and narrow about this text for a discourse, while at first blush it would seem to be made up of two parts not particularly related. Any impression of that sort is dispelled, however, by a little reflection.

Conferences between states, indeed, are not only suggestive of the lines upon which international law as a science may be expected to develop, but are among the most efficient means to that end. It is an essential preliminary to wise law-making to inquire to whom the law is to apply, and by whom it is to be applied. There was a stage in the history of international law when both these questions could be easily answered. While Rome was practically mistress of the world under the Cæsars, they both determined what should be the relations to each other of the various political communities under the Roman rule, and, if occasion arose, made their edicts operative by the use of the necessary force. After the Cæsars, the Holy Roman Empire and the Papacy exercised more or less completely the same prerogatives until, with the advent of the Reformation, the old order of things passed away and a period of lawlessness followed, during which international affairs seemed to be at the mercy of the strongest power concerned. It was succeeded by modern international law, so-called, of which Grotius is hailed as the father; for whose basis was taken the absolute independence and equality of states; and for whose rules the precepts of what is called the law of nature. These precepts were deemed to be founded in right reason and sound morals, were declared to be immutable, and were held to be instinctively recognized by all rational creatures and consequently to subject any offender against them to the just condemnation of mankind.

¹An address delivered before the American Society of International Law, April 20, 1907.

In point of pure theory and except as affected by usage or treaty, international law today consists of the precepts of the law of nature and is applicable to sovereign states which are absolutely equal and recognize no superior. It has often been argued that rules of conduct without a designate enforcer are not so much laws as exhortations; also that the precepts of the so-called law of nature are often nebulous in kind and uncertain in application and vary in different epochs and under diverse conditions. It is the principle of the absolute equality and independence of states, however, to which I ask your attention for a few moments. It means of course equality of rights and not of power. It is a principle which is simple in statement and easy to understand—which *prima facie* seems to be founded in right reason and calculated to be just and equitable in its working. Yet, while all this may be theoretically true of the principle of state equality, so much irreconcilable with it has been done within the last hundred years that its continued assertion seems to be an anachronism and a mistake. A crowd of international incidents goes to prove the principle to be one almost more active and better known in its breach than in its observance. Greece cut off from Turkey and erected into a separate kingdom with its integrity guaranteed; Belgium carved out of Holland as an independent kingdom and its neutrality secured; Switzerland declared to be perpetually neutral and its soil to be inviolable; Egypt, with its overlordship of the Porte and its English occupation; the Crimean War; the treaty of Paris of 1856; the treaty of Berlin of 1878; the Suez Canal; Japan and the comparatively barren results of her victory over China; Venezuela and her arbitrations, territorial and pecuniary; Morocco and the Algeciras conference; these are only some of the more prominent occurrences which demonstrate that the principle of the equality of states, while by no means a glittering generality, can not always be counted upon as a working rule. Its great value should consist in its protection of small and weak states—the great powers being competent to assert and maintain their equality without its aid. But it is in just the cases of inferior states that the principle has been markedly inoperative, so that, regarded as part of international law, the principle of state equality is found to work where its working might be dispensed with and not to work where its working might be most confidently looked for.

International law will hardly make much progress in the way of scien-

tific development so long as there is doubt as respects one of its basic principles—so long as it continues to lay down a rule, which, however plausible in theory, conflicts with the practice of the most civilized and enlightened states, and, if obeyed, would have inhibited and prevented numerous important international transactions which are universally acknowledged to have been wise in conception and beneficent in operation. It is necessary, therefore, to consider whether there must not be a material modification of the supposed hard and fast rule that every state is the equal of every other and is without a superior entitled to interfere with its absolute freedom of action. If there must be such modification, how are we to arrive at it and what is it to be?

The method of approach is, I think, obvious. Just as the best municipal law is a growth from the characteristics, habits, traditions, and environment of the people to whom it applies, so it is from the established usages and practices of the great nations of the earth that we must evolve the necessary limitations of the rule of absolute state equality. So far as the rule is concerned, in what direction is the civilized world moving and towards what goal? It is clearly proceeding from individualism to collectivism—in the direction of qualifying the right of a state to live unto itself alone and be a law unto itself alone by insisting upon its rights and duties as a member of the society of states. It will be remembered that along with the theory of a law of nature known to and binding upon all men, went the companion theory of a state of nature. In this state of nature a human being was conceived of as alone in the world, and rights and obligations founded on that fiction were imputed to him. The same twin theories applied to nations are responsible for the idea of a state in complete isolation and only amenable, like an individual similarly situated, to the so-called law of nature. But as with an individual in this imaginary solitude, so with a state—any theory of rights and obligations founded on it is unreal and deluding. Man has always been a member of human society as a state has always been a member of an international society—facts which must be reckoned with in both cases if rational rules are to be laid down for the practical conduct of the affairs of either men or states. The ever-increasing realization of this truth by civilized states furnishes the clue to the direction in which they are advancing, and to the modification to be made of the principle of the absolute equality of states. In place of it, it is probable that the equality predicated of

states in the future will be assimilated to that of the individual under every enlightened form of government and however unqualified in general, will be held to be an equality which, in fitting and special cases, must be subordinated to the welfare of the community of states generally. In this connection and for present purposes, savage tribes and scattered, nomadic, and casual collections of men may be disregarded. Organized political communities are the units composing the society of civilized states and each is a member because it must be. Its membership is compulsory because every such state, whether in territorial contact with another or otherwise, finds itself in some sort of relations with every other. Those relations may be friendly or hostile; may spring from racial sympathy or racial antipathy, from the acceptance or the rejection of a particular religious faith, from identity or from diversity of commercial interests; and may be of all degrees of intimacy or remoteness. In modern times the number and nearness and complexity of such relations have been infinitely increased by facilities for intercourse and intercommunication which have gone far to annihilate time and space and have largely reduced the importance of geographical location. But, just as these relations compel nations to recognize each other as members of an international society of states, they in like manner compel recognition of the necessity of rules by which such relations shall be regulated. The vital question is what rules and by whom determined? It is impossible to suggest any other author of such rules than the associated states themselves. No human power superior to them exists, and could they be reasonably expected to act with unanimity, the problem would be solved. Rules upon which all states are united assume the shape of genuine international laws, since what all agree to, all may be relied upon to enforce. But unanimity among states as to international rules, while it has been achieved in various instances, can be expected only after their justice and value have been sufficiently tested by time and experience. Nor would anything be gained by proposing that they be made by a majority of all the states of the international circle or even by two-thirds or three-quarters of them, since in each case the most important interests of a great empire might be placed at the mercy of an insignificant state having little or no concern with the substantial questions involved. For a like reason, infinitely strengthened in force by its comparative weakness, a small state may justly object to the determination of

international rules by the action of any less than the whole number of states.

It seems to be indisputable, therefore, that the development of international law, while sure unless the wheels of human progress are to be reversed, is inevitably slow and is likely to be measured by steps which may succeed one another at long intervals. A seeming but not real exception to the proposition that the practically unanimous consent of civilized states is the basis of genuine international law should not fail to be noticed. Though the world is not wide enough to prevent states the remotest from each other in space and distance being brought into close relations, it is yet so wide that international controversies often arise which are local or limited in their nature and in which only a group of states have a substantial interest. In a variety of such instances long established practice seems to sanction the conclusion that the particular group concerned may settle such controversies without consulting the whole international circle whose tacit acquiescence is to be regarded as the equivalent of express consent. The group which settles the question constitutes itself the common superior by which the law of the group is both manifested and enforced. Not to cite instances unnecessarily, the concert of Europe in its dealings with the many vexatious problems which comprise what is known as the "Eastern question" furnishes the most conspicuous illustration in point. It has subsisted for many years and, while its proceedings may not always have been the wisest and certainly have at times been severely criticised, its existence and general policy have on the whole been decidedly influential for good—have tended to avert great continental wars and to promote the best interests of civilization generally. In this particular instance, as in others in which the ascertained and collective will of all civilized states overrides the will of any recalcitrant state, the underlying and justifying principle is the general welfare—is the greater good of the greater number—is the best interests of Europe as a whole as compared with those of a single state or of a few states. That the justification may be satisfactory and may be recognized as such, the end should be honestly aimed at, should be pursued by reasonable and appropriate means and with all practicable regard to the interests and sentiments of states and nationalities, and should be incapable of challenge as merely veiling schemes of selfish aggrandizement. It has not been uncommon to treat the predomi-

nance of the European concert and the American primacy of the United States under the Monroe Doctrine as things of substantially the same nature. But, except as the United States and the European concert each outclass all probable antagonists of their respective policies in point of military strength, there is no real resemblance. The European concert practically takes charge of the international relations of certain smaller states and of their domestic affairs to the extent required by such international relations. The United States under the Monroe Doctrine has never undertaken and does not now undertake anything of that sort. So much of the Monroe Doctrine as touches the colonization of the American continents being eliminated, what is left of it and all that is pertinent to our times is that the United States will resent and resist any attempt by a European power to conquer the territory or violate the political independence of any American state. The United States and its Monroe Doctrine, therefore, differ from the European concert and its control of other European states in the most vital respects. The United States under the Monroe Doctrine assumes no protectorate over any other American state; attempts no interference with the external any more than with the internal affairs of such a state; asserts no right to dictate the domestic or the foreign policy of such a state; and claims no right to use force in the affairs of such a state except as against its enemies and to aid it in defending its political and territorial integrity as against European aggression. Such an attitude by the United States towards other American states is necessarily approved and welcomed by them; it may render them the greatest possible service and can not do them injury; it requires no consent from them because, even if prompted by an enlightened view of United States' interests, it confers upon other American states most important benefits and advantages without cost to themselves, pecuniary or political.

Within a comparatively short time other doctrines have been officially and non-officially advanced which, though without any real likeness to the Monroe Doctrine or any such *raison d'être* as the Monroe Doctrine, have been given prestige and currency by being described as the Monroe Doctrine or as necessary corollaries from it. Under these new doctrines it is intimated that, if an American state does not behave itself well in either its external or internal relations, good behavior—according to our own standards, of course—may be

enforced by the United States; also that an American state defaulting on its own debts to foreign creditors or not compelling that justice to foreign creditors from its own citizens demanded by international usage and practice, may be coerced by the United States into doing the right thing, and, if necessary, may have its revenues sequestered and applied by the United States according to the latter's notions of justice and equity. It is too plain for discussion that the Monroe Doctrine can not be invoked in support of any such pretensions; that they are seriously objectionable as calculated to wound the pride and excite the enmity of all other American states, and as committing the United States to undertakings of the most vexatious, burdensome and dangerous character. What is intended at this time, however, is not to discuss the new doctrines in question on their intrinsic merits but to inquire what foundation there is for them in that usage and practice of nations which forms the basis of modern international law. It is confidently believed that no justifying precedent for the new doctrines in question can be found. Nor can the consent to them of the civilized states of the world be looked for or presumed on the ground that the assertion and maintenance of such doctrines is essential to the political safety and welfare of the United States. Our institutions will surely live and our people continue to prosper without the United States converting itself into an international policeman for the American continents or into a debt-collecting agency for the benefit of foreign creditor states and their citizens. That the new doctrines—particularly if urged by officials in high places—must have unfortunate tendencies is clear. They are calculated to put the United States in the odious position of a possessor of enormous power who is eagerly looking for opportunities to exert it. They make us apparently oblivious of the truth that to have a giant's strength is excellent but to use it like a giant is tyrannous, and they seem to be the outcome of views and purposes which are likely to retard rather than to advance the development of international law, which in modern times finds itself not upon the arbitrary will of a Cæsar or of any potentate or state however mighty, but upon the consent of the society of states expressed or implied. Let it be assumed, however, as it should be, that the new doctrines, however objectionable in some aspects, may and should be credited to a wholly worthy origin; that they are designed to accomplish ends of such great and general importance as to justify an invasion of the rule

of absolute state independence and equality—how and on what lines is it desirable that the United States should proceed? Surely not by making itself a sort of international American “boss”—but by proceeding on lines justified by precedent and the highest considerations of policy—by initiating, cultivating and working through an American concert.

The will of a single state, however mighty, is much too narrow a basis on which to build international law, and were a single state to take the place of the European concert, it would—even if in every way as powerful as the concert—be immeasurably inferior to it in point of international influence and authority. When great states agree among themselves as to the international relations of other and weaker states, they at the same time also put restraints upon themselves. They virtually check the ambition and aggressiveness of all parties to the agreement and thus furnish a guaranty of the propriety and sincerity of their purposes impossible to be furnished by a single state in the same position. That an American concert of purely American states would occupy a position in America practically equivalent to that of the European concert in Europe; that it would tend to avert wars between states as well as insurrections and revolutions within states; that it would do much to further trade and commerce and intercourse of all kinds between the various American states; and that the United States, as a leading member of the concert, might be counted upon as an agency for good even more potent than if acting in the invidious rôle of sole and supreme dictator seem to be tolerably sure results. It is not to be imagined, of course, that an American concert on the same general lines as the concert of Europe would prove a perfect instrumentality for securing to the several states concerned just and equitable international relations. To even approximate that result, the bond between parties to the concert must be much stronger, its jurisdiction much larger and better defined, and the means for executing its decisions much better ascertained. It would need to resemble much more closely such plans of union as those by which interstate relations are regulated under our national constitution or under the constitution of the German Empire. No legal principle, for example, is better founded in justice and equity than that the owner of whatever is taken for public uses shall have compensation, and if the United States, in building a military road or any other public work within the scope

of its authority, takes the property of a state, it is bound and is compellable to indemnify the state. Justice and equity require the application of the same principle as between states even if they are bound to each other by no firmer or more comprehensive ties than those which characterize the concert of Europe. The United States, for instance, is now executing a great public work on territory which but recently was the property of a sister republic. There is no pretense that that republic ever parted with its territory voluntarily. The territory was practically expropriated by the United States claiming—and it is the best justification the circumstances afford—to act as the “mandatary of civilization.” But, if the United States is to be deemed to have held a mandate from civilization to sequester Columbian soil for a great public work, it should also be deemed to have held a mandate to see that Columbia was duly compensated—otherwise civilization stands revealed as an objectionable personage quite insensible to the most elementary claims of justice. Would it not have been well if the United States had seized the opportunity to emphasize its good faith and its keen sense of justice; to begin the foundation of a new rule of international law; and to demonstrate by example as well as by precept that, in the rare case in which a state is compelled to sacrifice something of its independence and integrity to the exigencies of the general welfare of all states, it is entitled to all the consideration and all the reparation that circumstances admit of?

On the grounds already stated it is believed that the principle of the absolute equality of states must be considered as modified by those rules of international conduct which, having been adopted by civilized states with practical unanimity, no state is at liberty to violate. How they have been adopted—whether by express stipulation, by acquiescence, by usage and practice, or as the result of judicial decisions—is immaterial, nor can there be any fair question of the enforcement of such rules and of the right to enforce them on the part of the entire body of civilized states. As a practical matter, however, such enforcement will generally, if not always, be by the state or states immediately aggrieved by any violation, acting not for itself or themselves exclusively, but also in the right and for the benefit and as the agent of the whole international society. Rules not commanding such universal assent, whether acted upon by only one or a few states, or formulated at international congresses, or advocated by eminent jurists and states-

men, or commended only by their own intrinsic merits, being dependent as they are for their efficacy and ultimate adoption upon the force and growth of public opinion in their favor, may be regarded as international laws in the making. But rules already adopted by all civilized states and justly enforceable against any offender by all or by any state or states especially aggrieved, are to be deemed international laws actually established as such. Such laws already cover numerous topics of great importance, as, for example, various written and unwritten codes governing the high seas and their navigation, the crime and penalties of piracy, the obligations of treaties, the jurisdiction over littoral and territorial waters and its limits, certain rights of neutrals, the rights and immunities of the Red Cross, and many other usages and practices prevailing in times of actual hostilities.

In view of the unanimity of civilized states necessary to constitute a rule of international law—a unanimity to be ordinarily inferred from long established usage and practice—it may be asked whether anything effective can really be done towards hastening the development of international law—whether such development must not await the slow and gradual process of piecemeal evolution from international transactions and incidents as they from time to time occur? Such a conclusion would be unfortunate and there is no sufficient reason for accepting it. Doubtless there are many other ways in which the accomplishment of the great object desired can be accelerated. But all combined must, it is believed, yield in potency to international conferences like those of the Hague. Each is an object lesson of the most efficacious sort. Each makes nations better acquainted through the familiar intercourse with each other of their leading public men. Each brings on able and thorough investigation and discussion of international relations and the rules which should govern them. Each of them is sure to lead to the discovery that on many important topics all nations are substantially agreed. Each is likely to leave behind a body of doctrine which commands universal assent. If propositions result to which there is temporarily only partial assent, each at least succeeds in bringing the questions involved before the world and in attracting to them consideration by the most eminent jurists and statesmen of all countries. Every Hague conference, indeed, in addition to the positive results reached, is a true educational campaign of world-wide and most beneficial influence. Suppose the proceedings of a particular

conference should prove academic merely, and produce rules which, however intrinsically praiseworthy, do not at the time command the unanimous or even the general assent of civilized states. Nevertheless, if such rules be manifestly correct and salutary in themselves, it would be wrong to estimate them as of no account—it would be a grave mistake not to realize that though for the time being without political sanction, they have behind them a force of wonderful potency. Laws are not necessarily the most effective to which the police and the military are bound and presumably stand ready to compel obedience. If palpably unwise and at variance with the instincts and sentiments of the people to whom they apply, it is familiar experience that the executive power of the state seems to be paralyzed and that such laws remain practically inoperative. The same public opinion, which often nullifies the most formal and elaborate statutes, never fails to exact obedience to unwritten and intangible laws whose roots are found deep in the popular mind and conscience. In favor of all wise and just rules of international conduct formulated by conferences at the Hague or by other like conferences, the public opinion of the civilized world may be relied upon to furnish a force ever growing more and more potent, until such rules receive complete international recognition and acceptance. When in 1823 Webster would have had this country express sympathy with the revolt of the Greeks against Turkey and it was objected that the thing was useless because we did not propose to fight for Greece or to endanger our own peace in any way, he made an answer which is among the most impressive of his public utterances:

Sir, this reasoning mistakes the age. The time has been indeed when fleets, and armies, and subsidies, were the principal reliances even in the best cause. But, happily for mankind, a great change has taken place in this respect. Moral causes come into consideration in proportion as the progress of knowledge is advanced; and the public opinion of the civilized world is rapidly gaining an ascendancy over mere brutal force. It is already able to oppose the most formidable obstruction to the progress of injustice and oppression, and as it grows more intelligent and more intense, it will be more and more formidable. It may be silenced by military power, but it can not be conquered. It is elastic, irresistible, and invulnerable to the weapons of ordinary warfare. It is that impassible, inextinguishable enemy of mere violence and arbitrary rule which, like Milton's angels,

“Vital in every part,
Can not but by annihilating die.”

If the foregoing observations are of any value, it consists in noting and emphasizing the crucial fact that individualism as the essence of the relations between states must be regarded as largely modified by what may be termed internationalism. State independence as the basis of international law has become radically qualified by state interdependence. The importance of the change not merely in theoretical but in practical consequences may be readily tested. In seeking for the ideal condition of international relations, the paramount object is the prevention of war—is international peace. But the greater the interdependence of any two states, the more each relies upon the other for the essentials of well-being, the more intimately their respective peoples are bound together by social and commercial ties, the less likely they are to engage in war and the more likely they are to provide against it in advance by arbitration agreements and all other appropriate preventive measures. Further, any would-be belligerents not only stand to each other in relations of mutual dependence, but each of them stands in similar relations to other civilized states who will be sufferers by war as well as the actual combatants themselves. Hence comes an outside pressure upon such belligerents to settle their quarrel without fighting—a pressure which will be powerful in all cases and is irresistible in many even after hostilities have become imminent. But the potency of these interdependent relations of states by no means delays showing itself until a warlike crisis is actually at hand. It leads the wise and patriotic statesmen of all countries to unite their best energies in conceiving plans and devising machinery through which the entire body of civilized states shall use its influence to disperse war clouds almost automatically and as fast as they rise above the horizon. The Hague conference of 1899 did much in that direction by facilitating international arbitration and making mediation between angry states rather a friendly courtesy than a piece of officious impertinence. Other like conferences may be expected to make substantial progress in the same direction and the advent of the time when "Nation shall not lift up sword against nation, neither shall they learn war any more" is by no means to be put down as among the dreams of poets or the visions of seers. The interdependent relations of states, constantly increasing in number and closeness and strength, are constantly making war increasingly difficult, impracticable and repulsive. They are steadily

bringing nearer and making more imperative agreements between the civilized states of the world, by which war, already branded as the worst possible violation of the dictates of common sense and sound morals, shall also be a crime in the sight of international law and as such be both preventable and punishable by all the forces which organized civilization may be able to command.

RICHARD OLNEY.

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EDITORIAL COMMENT

THE SECOND PEACE CONFERENCE OF THE HAGUE

The second Hague peace conference is no longer a matter of speculation, it is now a certainty. Invitations have been issued to and accepted by the recognized states of the world, and chosen representatives of these states will meet at the Hague on the afternoon of June 15, 1907.

The first conference was looked upon as an experiment and many there were who shook their heads in doubt. It did not wholly justify the hopes of its friends and well-wishers. It did not produce a general disarmament, neither did it succeed in limiting armaments nor in placing a limit upon the expenditures necessary to preserve peace by force. It did, however, discuss these great problems and relegated them, unsolved though they were, to the consideration of a future and perhaps more favorable conference. They are in the nature of unfinished business and will doubtless be considered and treated as such.

If war was not abolished and the era of universal peace ushered in, a serious and successful attempt was made to give definiteness and consistency to the laws of war on land, and to the sick and wounded upon the seas there were extended the humane principles of the Red

Cross, which principles have done so much to mitigate the horrors incident to warfare. The crowning work of the conference was, however, the establishment of a tribunal to which litigant nations might resort for the peaceful and judicial settlement of difficulties which, if unsettled, might justify in the minds of some an appeal to the sword. If war cannot be abolished, unnecessary suffering should be eliminated, and difficulties between nations which might easily lead to war may be settled by the resort to a tribunal clothed with the power to examine the facts and on the facts as found to give redress. The first conference showed the possibility of discussing in the abstract questions of international importance. Great as was its service, it was but a first and conscious step in the line of progress. For the actual work accomplished by the conference of 1899 reference is made to the supplement in which the French and English text of the final act is given preceded by documents necessary to its intelligent understanding.

The first conference looked forward at no distant date to a second meeting of the nations. As Europe seemed unwilling to take the initiative, President Roosevelt on October 21, 1904, gave voice to the universal desire of this country that a second conference might assemble in order to take up and advance the work so auspiciously inaugurated by the conference of 1899. The late John Hay as secretary of state, issued the following circular to the representatives of the United States accredited to each of the governments signatory to the acts of the Hague conference:

SIR: The peace conference which assembled at the Hague on May 18, 1899, marked an epoch in the history of nations. Called by his majesty the emperor of Russia to discuss the problems of the maintenance of general peace, the regulation of the operations of war, and the lessening of the burdens which preparedness for eventual war entails upon modern peoples, its labors resulted in the acceptance by the signatory powers of conventions for the peaceful adjustment of international difficulties by arbitration, and for certain humane amendments to the laws and customs of war by land and sea. A great work was thus accomplished by the conference while other phases of the general subject were left to discussion by another conference in the near future, such as questions affecting the rights and duties of neutrals, the inviolability of private property in naval warfare, and the bombardment of ports, towns, and villages by a naval force.

Among the movements which prepared the minds of governments for an accord in the direction of assured peace among men, a high place may fittingly be given to that set on foot by the Interparliamentary Union. From its origin in the suggestions of a member of the British house of commons, in 1888, it developed until its membership includes large numbers of delegates from the parliaments of the principal nations, pledged to exert their influence toward the conclusion of treaties of arbitration between nations and toward the accomplishment of peace. Its annual conferences have notably advanced the high purposes it sought to realize. Not only

have many international treaties of arbitration been concluded, but, in the conference held in Holland in 1894, the memorable declaration in favor of a permanent court of arbitration was a forerunner of the most important achievement of the peace conference of the Hague in 1899.

The annual conference of the Interparliamentary Union was held this year at St. Louis, in appropriate connection with the World's Fair. Its deliberations were marked by the same noble devotion to the cause of peace and to the welfare of humanity which had inspired its former meetings. By the unanimous vote of delegates, active or retired members of the American congress and of every parliament in Europe with two exceptions, the following resolution was adopted:

WHEREAS, Enlightened public opinion and modern civilization alike demand that differences between nations should be adjudicated and settled in the same manner as disputes between individuals are adjudicated, namely, by the arbitrament of courts in accordance with recognized principles of law, this conference requests the several governments of the world to send delegates to an international conference to be held at a time and place to be agreed upon by them for the purpose of considering:

1. The question for the consideration of which the conference at the Hague expressed a wish that a future conference be called.

2. The negotiation of arbitration treaties between the nations represented at the conference to be convened.

3. The advisability of establishing an international congress to convene periodically for the discussion of international questions.

And this conference respectfully and cordially requests the president of the United States to invite all the nations to send representatives to such a conference.

On the twenty-fourth of September, ultimo, these resolutions were presented to the president by a numerous deputation of the Interparliamentary Union. The president accepted the charge offered to him, feeling it to be most appropriate that the executive of the nation which had welcomed the conference to its hospitality should give voice to its impressive utterances in a cause which the American government and people hold dear. He announced that he would at an early day invite the other nations, parties to the Hague conventions, to reassemble with a view to pushing forward toward completion the work already begun at the Hague, by considering the questions which the first conference had left unsettled with the express provision that there should be a second conference.

In accepting this trust, the president was not unmindful of the fact, so vividly brought home to all the world, that a great war is now in progress. He recalled the circumstances that at the time when, on August 24, 1898, his majesty the emperor of Russia sent forth his invitation to the nations to meet in the interests of peace, the United States and Spain had merely halted, in their struggle, to devise terms of peace. While at the present moment no armistice between the armies now contending is in sight, the fact of an existing war is no reason why the nations should relax the efforts they have so successfully made hitherto toward the adoption of rules of conduct which may make more remote the chances of future wars between them. In 1899 the conference of the Hague dealt solely with the larger general problems which confront all nations, and assumed no function of intervention or suggestion in the settlement of the terms of peace between the United States and Spain. It might be the same with a reassembled conference at the present time. Its efforts would naturally lie in the direction of further codification of the universal

ideas of right and justice which we call international law; its mission would be to give them future effect.

The president directs that you will bring the foregoing considerations to the attention of the minister of foreign affairs of the government to which you are accredited and, in discreet conference with him, ascertain to what extent that government is disposed to act in the matter.

Should his excellency invite suggestion as to the character of the questions to be brought before the proposed second peace conference, you may say to him that, at this time, it would seem premature to couple the tentative invitation thus extended with a categorical programme of subjects of discussion. It is only by comparison of views that a general accord can be reached as to the matters to be considered by the new conference. It is desirable that in the formulation of a programme the distinction should be kept clear between the matters which belong to the province of international law and those which are conventional as between individual governments. The final act of the Hague conference, dated July 29, 1899, kept this distinction clearly in sight. Among the broader general questions affecting the right and justice of the relation of sovereign states, which were then relegated to a future conference, were: the rights and duties of neutrals; the inviolability of private property in naval warfare; and the bombardment of ports, towns, and villages by a naval force. The other matters mentioned in the final act take the form of suggestions for consideration by interested governments.

The three points mentioned cover a large field. The first, especially, touching the rights and duties of neutrals, is of universal importance. Its rightful disposition affects the interests and well-being of all the world. The neutral is something more than an on-looker. His acts of omission or commission may have an influence—indirect, but tangible—on a war actually in progress; whilst, on the other hand, he may suffer from the exigencies of the belligerents. It is this phase of warfare which deeply concerns the world at large. Efforts have been made time and again, to formulate rules of action applicable to its more material aspects, as in the declarations of Paris. As recently as the twenty-eighth of April, of this year, the congress of the United States adopted a resolution reading thus:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the sense of the congress of the United States that it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war, that the president endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

Approved, April 28, 1904.

Other matters closely affecting the rights of neutrals are: the distinction to be made between absolute and conditional contraband of war and the inviolability of the official and private correspondence of neutrals.

As for the duties of neutrals toward the belligerents, the field is scarcely less broad. One aspect deserves mention, from the prominence it has acquired during recent times; namely, the treatment due to refugee belligerent ships in neutral ports.

It may also be desirable to consider and adopt a procedure by which states non-signatory to the original acts of the Hague conference may become adhering parties.

You will explain to his excellency the minister of foreign affairs that the present

overture for a second conference to complete the postponed work of the first conference is not designed to supersede other calls for the consideration of special topics, such as the proposition of the government of the Netherlands, recently issued, to assemble for the purpose of amending the provisions of the existing Hague convention with respect to hospital ships. Like all tentative conventions, that one is open to change in the light of practical experience, and the fullest deliberation is desirable to that end.

Finally, you will state the president's desire and hope that the undying memories which cling around the Hague as the cradle of the beneficent work which had its beginning in 1899 may be strengthened by holding the second peace conference in that historic city.

The replies to the circular were encouraging and showed as usual that the president had correctly interpreted the popular desire, but with a graciousness well-nigh unprecedented in world-politics he yielded the initiative to the emperor of Russia.

The president most gladly welcomes the offer of his imperial majesty to again take upon himself the initiation of the steps requisite to convene a second international peace conference, as the necessary sequence to the first conference, brought about through his majesty's efforts, and in view of the cordial responses to the president's suggestion of October, 1904, he doubts not that the project will meet with complete acceptance and that the result will be to bring the nations of the earth still more closely together in their common endeavor to advance the ends of peace.

The Czar Nicholas, freed from the embarrassment of a war at the extremes of his empire, immediately devoted himself to the self-imposed mission of peace. On the twelfth of April, 1906, Baron Rosen submitted to the secretary of state a tentative programme for the work of a second conference. The document in full reads as follows:

Mr. Secretary of State: When it assumed the initiative of calling a second peace conference, the imperial government had in view the necessity of further developing the humanitarian principles on which was based the work accomplished by the great international assemblage of 1899.

At the same time, it deemed it expedient to enlarge as much as possible the number of states participating in the labors of the contemplated conference, and the alacrity with which the call was answered bears witness to the depth and breadth of the present sentiment of solidarity for the application of ideas aiming at the good of all mankind.

The first conference separated in the firm belief that its labors would subsequently be perfected from the effect of the regular progress of enlightenment among the nations and abreast of the results acquired from experience. Its most important creation, the International Court of Arbitration, is an institution that has already proved its worth and brought together, for the good of all, an areopagus of jurists who command the respect of the world. How much good could be accomplished by international commissions of inquiry toward the settlement of disputes between states has also been shown.

There are, however, certain improvements to be made in the convention relative to the peaceful settlement of international disputes. Following recent arbitrations, the jurists assembled in court have raised certain questions of details which should be acted upon by adding to the said convention the necessary amplifications. It would seem especially desirable to lay down fixed principles in regard to the use of languages in the proceedings in view of the difficulties that may arise in the future as the cases referred to arbitral jurisdiction multiply. The *modus operandi* of international commissions of inquiry would likewise be open to improvement.

As regards the regulating of the laws and customs of war on land, the provisions established by the first conference ought also to be completed and defined, so as to remove all misapprehensions.

As for maritime warfare, in regard to which the laws and customs of the several countries differ on certain points, it is necessary to establish fixed rules in keeping with the exigencies of the rights of belligerents and the interests of neutrals.

A convention bearing on these subjects should be framed and would constitute one of the most prominent parts of the tasks devolved upon the forthcoming conference.

Holding, therefore, that there is at present occasion only to examine questions that demand special attention as being the outcome of the experience of recent years, without touching upon those that might have reference to the limitation of military or naval forces, the imperial government proposes for the programme of the contemplated meeting the following main points:

1. Improvements to be made in the provisions of the convention relative to the peaceful settlement of international disputes as regards the court of arbitration and the international commissions of inquiry.

2. Additions to be made to the provisions of the convention of 1889 relative to the laws and customs of war on land—among others, those concerning the opening of hostilities, the rights of neutrals on land, etc. Declarations of 1899. One these having expired, question of its being revived.

3. Framing of a convention relative to the laws and customs of maritime warfare, concerning:

The special operations of maritime warfare, such as the bombardment of ports, cities, and villages by a naval force; the laying of torpedoes, etc.

The transformation of merchant vessels into war ships.

The private property of belligerents at sea.

The length of time to be granted to merchant ships for their departure from ports of neutrals or of the enemy after the opening of hostilities.

The rights and duties of neutrals at sea, among others the question of contraband, the rules applicable to belligerent vessels in neutral ports; destruction, in cases of *vis major*, of neutral merchant vessels captured as prizes.

In the said convention to be drafted, there would be introduced the provisions relative to war on land that would be also applicable to maritime warfare.

4. Additions to be made to the convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva convention of 1864.

As was the case at the conference of 1899, it would be well understood that the deliberations of the contemplated meeting should not deal with the political relations of the several states, or the condition of things established by treaties, or in general with questions that did not directly come within the programme adopted by the several cabinets.

The imperial government desires distinctly to state that the data of this programme and the eventual acceptance of the several states clearly do not prejudge the opinion that may be delivered in the conference in regard to the solving of the questions brought up for discussion. It would likewise be for the contemplated meeting to decide as to the order of the questions to be examined and the form to be given to the decisions reached, as to whether it should be deemed preferable to include some of them in new conventions or to append them, as additions, to conventions already existing.

In formulating the above-mentioned programme, the imperial government bore in mind, as far as possible, the recommendations made by the first peace conference, with special regard to the rights and duties of neutrals, the private property of belligerents at sea, the bombardment of ports, cities, etc. It entertains the hope that the government of the United States will take the whole of the points proposed as the expression of a wish to come nearer that lofty ideal of international justice that is the permanent goal of the whole civilized world.

By order of my government, I have the honor to acquaint you with the foregoing, and awaiting the reply of the government of the United States with as little delay as possible, I embrace this opportunity to beg you, Mr. Secretary of State, to accept the assurance of my very high consideration.

ROSEN.

Nothing remained but to obtain the consent of the nations to this tentative programme and to fix the date for the meeting at the Hague. It was wisely recognized that all nations large and small have a common interest in the advancement of justice and peace. The invitation therefore was extended to the civilized world and it is pleasing to be able to state that the invitation was accepted in the broad, catholic and universal spirit in which it was extended. It will not perhaps be out of place to mention that the invitation to the South American republics was due in no small measure to our secretary of state. It is frequently asserted that the United States looks upon the Central and South American republics as subject to its tutelage. Mr. Root, however, by advocating their admission to the Hague gives evidence of the desire of the United States for the advancement of our Southern neighbors and shows that far from confining them to the western world, our policy is to introduce them as equals in a conference of nations. It is no exaggeration, therefore, to state that the second Hague conference will be in the widest and fullest sense of the word, a world conference.

A difficulty, however, presented itself at this stage, for if the Pan-American conference was to be held at Rio de Janeiro during the summer of 1906, the representatives of the western world could not well take part in the European conference at one and the same time. The project therefore to hold the Hague conference in the summer of 1906 either had to be amended or the conference at Rio de Janeiro would have to be adjourned. At the request of the United States the meeting at

the Hague was postponed to avoid any possibility of conflict or interference. By universal agreement the conference has been called for the summer of 1907.

There has been much discussion as to the program to be submitted and discussed at the Hague, for while the conference is international in its nature, nations have from the nature of things national interests and it is a matter of great difficulty to harmonize these interests and unite upon a programme with which all may agree. The purpose of the conference is eminently practical. It is not a parliamentary body in which motions are voted by majorities. The condition of progress is not that one nation or any few nations may take a step in advance but that all nations may take the same step, and it is wiser to do a few things with the consent of all than to attempt many things which must necessarily meet opposition and fail of universal consent. A programme submitted to such a conference must be the minimum of desire if a positive and satisfactory result is to be secured. Progress is, however, the outcome of discussion and the reforms of the future will no doubt be the result of a present interchange of thought. For this reason various nations have insisted that special projects be discussed at the convention although they have not made their participation in the conference conditioned upon the acceptance of any or all of these. The nature and extent of these various propositions are expressed in the *note verbale* of the fourth of April, 1907, from the Russian ambassador to the secretary of state.

The undersigned, ambassador of Russia, by order of his government, has the honor to make the following communication to his excellency the secretary of state of the United States:

Before the second peace conference is called, the imperial government deems it an obligation to submit to the powers which have accepted its invitation a statement of the present situation.

All the powers to which the imperial government communicated in April, 1906, its tentative program of the labors of the new conference have declared their adhesion thereto.

However, the following remarks have been made with respect to that programme.

The government of the United States has reserved to itself the liberty of submitting to the second conference two additional questions, viz: the reduction or limitation of armament and the attainment of an agreement to observe some limitations upon the use of force for the collection of ordinary public debts arising out of contracts.

The Spanish government has expressed a desire to discuss the limitation of armaments, reserving to itself the right to deal with this question at the next meeting at the Hague.

The British government has given notice that it attaches great importance to having the question of expenditures for armament discussed at the conference, and

has reserved to itself the right of raising it. It has also reserved to itself the right of taking no part in the discussion of any question mentioned in the Russian programme which would appear to it unlikely to produce any useful result.

Japan is of opinion that certain questions that are not especially enumerated in the programme might be conveniently included among the subjects for consideration, and reserves to itself the right to take no part in or withdraw from any discussion taking or tending to take a trend which, in its judgment, would not be conducive to any useful result.

The governments of Bolivia, Denmark, Greece, and the Netherlands have also reserved to themselves, in a general way, the right to submit to the consideration of the conference other subjects similar to those that are explicitly mentioned in the programme.

The imperial government deems it its duty to declare, for its part, that it maintains its programme of the month of April, 1906, as the basis for the deliberations of the conference, and that if the conference should broach a discussion that would appear to it unlikely to end in any practical issue it reserves to itself, in its turn, the right to take no part in such a discussion.

Remarks similar to this last have been made by the German and Austro-Hungarian governments, which have likewise reserved to themselves the right to take no part in the discussion by the conference of any question which would appear unlikely to end in any practical issue.

In bringing these reservations to the knowledge of the powers and with the hope that the labors of the second peace conference will create new guaranties for the good understanding of the nations of the civilized world, the imperial government has addressed to the government of the Netherlands a request that it may be pleased to call the conference for the first days of June.

The undersigned embraces this opportunity to renew to His Excellency, Mr. Root, the assurances of his highest consideration.

ROSEN.

It is of course impossible to predict the outcome of the conference. It is, however, safe to say that the Russian programme will form the basis of discussion and that progress will be along this line. The desire to discuss other topics whether or not they meet with such favor in the conference as to form a part of the final act, shows the seriousness with which the nations approach the conference and the importance attached to its proceedings and discussions.

The American commission as announced is as follows:

Joseph H. Choate, former ambassador to the Court of St. James;
General Horace Porter, former ambassador to France;

Uriah M. Rose, of Arkansas, former president of the American Bar Association, and now president of the Arkansas Bar Association;
David Jayne Hill, United States minister to the Netherlands; and
former assistant secretary of state;

Brigadier General George B. Davis, judge advocate general, U. S. A.,
and former professor of international law at the United States
Military Academy;

Rear Admiral Charles S. Sperry, U. S. N., president of the Naval War College;

William I. Buchanan, former minister to Argentina and to Panama, and chairman of the American delegation to the Rio conference;

Chandler Hale, secretary to the delegation, and former secretary of the United States embassy at Vienna;

James Brown Scott, expert in international law, solicitor for the Department of State;

Charles Henry Butler, expert attaché, reporter of the United States Supreme Court.

THE DISSOLUTION OF THE UNION OF NORWAY AND SWEDEN

Mr. Lecky declared nationality to be the miracle of our day. The Italian school of international law is based upon nationality, and the sentiment is world-wide that a community of race, institutions and language somehow lies at the basis of statehood. It is clear that an autocrat who denies the right of self-government would naturally reject the plea of nationality, but the nineteenth century dealt roughly with the autocrat and it is not too much to hope that the twentieth century will turn him into a statesman. The congress of Vienna of 1815 adopted the principle of legitimacy, as distinct from nationality, in the settlement of the world's peace, but the legitimacy of the congress looked only to the ruler, not to the ruled. Popular understanding of legitimacy differed radically from that of the diplomat, and little by little the rights of the ruled to organize themselves into a community under a government suited to their needs has modified considerably the map of Europe.

The congress of Vienna yoked Holland and Belgium into the kingdom of the Netherlands, but revolution dissolved the unnatural bond. Greece longed for a government of its own, and Europe yielded. The outbreak of 1848 assumed proportions of a democratic and universal movement which gave the rulers pause. The expulsion of Austria from Italy and the union of the Italian states into a kingdom of Italy under a sovereign of its choice, the expulsion of Austria from Germany and the establishment of a German empire in accordance with the hope and aspirations of centuries, the creation of the dual monarchy of Austria upon race lines, and finally the collapse of the Ottoman empire and the establishment of distinct and independent sovereign communities in the Balkan peninsula, show at a glance that nationality may indeed be checked and controlled for a time but that it cannot in our day and generation be overthrown.

The importance of the principle of nationality in the modern conception of international law has been admirably stated by a recent and authoritative writer.

The third moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a state of their own, in which they can live according to their own ideals and can build up a national civilization, they will certainly get that state sooner or later. What international politics can do and should do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority. States embracing a population of different nationalities can exist and will always exist, as many examples show.

And even where the race forms but a portion of the larger political unit, a realization of the past and a hope of the future preserve intact a feeling of nationality. Wales has held its own, although it is an integral part of England. The national movement is spreading in Ireland and the world sees the strange and unprecedented spectacle of a people settling down to a grammar and dictionary to acquire a language which was once their own.

The most recent instance of the application of the doctrine of nationality to a concrete case is the separation of Norway and Sweden and the establishment of an independent kingdom of Norway based upon race and national ideals. For centuries Norway was independent and governed itself as it would; for centuries, that is to say from 1387 to 1814, it was either a part of Sweden or a province of Denmark. From 1814 till yesterday it was a junior partner in the kingdom of Norway-Sweden. In 1905 it emerged from dependence and took its place as an equal in the family of nations.

In 1814 when Europe was in arms against Bonaparte and the empire was in the throes of dissolution, Norway was ceded to Sweden, amid the protests of its people.

His Majesty, the King of Denmark, in behalf of himself and his successors to the throne and kingdom of Norway, forever renounces all his rights and claims to the kingdom of Norway in favor of the King of Sweden.

The coöperation of Sweden was worth more than a province.

The Swedes and the Norwegians were not on the best of terms and never had been. To be forced to join an uncongenial neighbor was too much for the blood of the discoverers of new worlds, and in a spirit of rebellion they elected Christian Frederick, heir of Frederick VI. of Den-

mark, king. Great Britain, however, in conjunction with the allied powers decided from reasons of policy that this independence was exhibited at an untimely moment, and Norway was forced to decree her own union with Sweden, November 4, 1814. The word of Bernadotte, marshal of France and crown prince of Sweden, was not to be trifled with.

In this union and the spirit exhibited by the Norwegians at the time, can be seen, perhaps, a forerunner of the action of dissolution, June 7, 1905. In the act of union Norway insisted upon securing absolute independence, with no other bond than an hereditary monarch who was to have his Norwegian as well as his Swedish council, and who was to spend a portion of each year in the land of the fjords. It was a "monarchy and defensive alliance for the protection of their mutual throne."

Since that time Norway has shown by her restiveness a strong dislike for foreign control, especially Swedish control. The fundamental law of the constitution, which, in true loyalty, "almost every peasant farmer nowadays has framed and hung up in the chief room of his house" did not secure the one important power that the Norwegians especially desired, the power to manage their own foreign affairs, especially those of a commercial nature. The foreign minister was almost always a Swede, though up to 1885 he was responsible to the king. Hence the Norwegians looked upon him as responsible to their sovereign. But in that year the Swedish parliament made the minister of foreign affairs directly dependent upon them and liable to them for his acts. With this change the people of Norway saw their last claim to the managing of their own foreign policies slipping into Swedish hands, and Norway was still more subordinate in international affairs and relations.

The consular service, above all, was a bone of contention. The two nations had one service in common, and Norway, with a thriving commerce, three times the size of Sweden's, with more coast line, and with the blood of the Vikings in her veins, struggled and fought for years for more freedom to develop, and for the last fifteen years specifically for a separate consular service to aid her own growing trade.

It was on May 28, 1905, that King Oscar officially denied the right of Norway to this separate representation abroad by vetoing a measure to provide for a distinct consular service to Norway, even after a joint committee from the two nations had recommended its passage. The Storting (the Norwegian parliament) immediately proclaimed that the king had violated the constitution, thereby dissolving the union and dethroning himself. The cabinet resigned and the Storting expressed itself as follows:

WHEREAS, All the members of the council of state have laid down their offices; Whereas, His Majesty the King, has declared himself unable to establish a new government for the country; and Whereas, The constitutional regal power thus becomes imperative, the Storting authorizes the members of the council of state who retired today to exercise until further notice as the Norwegian government the power appertaining to the king in accordance with Norway's constitution and existing laws, with those changes which are necessitated by the fact that the union with Sweden under one king is dissolved in consequence of the king having ceased to act as Norwegian king.

With this condition of affairs the Swedish government attempted to deal. The voice of the Swedish upper house was the strongest in opposition to a peaceful settlement; in fact this aristocracy of landed men was almost the only power for the enforcement of the union upon Norway against her will. Perhaps they did not or would not see the centuries of opposition to Sweden which ninety years of union had been powerless to overcome, or the differing desires and needs of the two people shown in the first case not only by the struggles for political freedom but by the tendencies leading away from the old religions and dogmas; and in the second place by the demand for free trade in Norway, as against the protective tariff of Sweden.

The separation was the outcome of natural causes, it was the breaking out of old feelings, long suppressed, when restraint was imposed on the right to manage the historical and traditional vocation of the Norsemen, their commerce and its development.

And so, without ostentation, but with firmness, and no doubt with a glance at the framed constitutions in the "chief room of the house," the people on August 13, 1905, by a vote of 368,000 against 184 decided that Norway should again be free to take her place in the family of nations under her own king and with her own unaided hand at the tiller. Sweden acquiesced finally and on September 23, 1905, the treaty of Karlstad (see Supplement) was signed.

Norway's first thought seems to have been a look backward to Denmark from whom she had unwillingly parted in 1814 and from whom she had tried to choose a ruler in the abortive attempt at establishing an independent government at that time. In spite of any fleeting dreams of Emperor Wilhelm that he might see a German prince on the Norwegian throne, or those that some of the more enthusiastic Norsemen may have had of a republic, the country chose and elected by popular vote to reign "by the grace of the people and not by divine right," as one writer explains, Prince Charles of Denmark, who became King Haakon VII. The separation was complete, and the very

name of the king linked the Norway of today to the Norway of the traditional past.

The present is secure, but what of the future? A glance at the map shows the geographical importance of Norway. It is indeed true that Sweden and Denmark control the entrance to the Baltic. It is, however, a fact that Norway cannot be overlooked in this connection. For although the canal at Kiel may serve a great purpose, the natural entrance and outlet to and from the North Sea and the Baltic lies between Denmark and Sweden with Norway looming up large on the horizon. A family alliance with Great Britain is no doubt a great protection; the fear and jealousy of the Russian is likewise no mean political asset, while the uncertainty of the relations of France and Germany may prevent any fear of aggression from Germany even supposing the desire were present. The geographical and political situation would seem, therefore, in the nature of things to neutralize the northern kingdoms. Their importance lies in their geography, and paradoxically speaking, their very weakness is their strength.

THE INTERNATIONAL STATUS OF KOREA

For centuries Korea has been a battle-ground between China on the one hand and Japan on the other, and lately within the memory of the present generation, indeed but yesterday, it has been the cause of war between Russia and the Island Empire. It was the cause of the war of 1894 between China and Japan by means of which the latter took its place among the nations, and more recently it was the cause of the war of 1904-1905 between Russia and Japan at the conclusion of which Japan emerged as a great world-power.

The possession of Korea means much to others, to itself it means little or nothing. It is a prize to be contended for, and its destiny seems to depend upon the wish and strength of others. It at one time and for centuries depended upon China, at another depended upon Japan. For a few short years, from 1876 to 1894 it tasted the sweets of independence. By the treaty of peace, amity and commerce of February 27, 1876, between Korea and Japan the independence of Korea was recognized as far as Japan was concerned. Its various ports were opened to Japanese trade and a diplomatic minister was to reside at Seoul.

The independence of Korea was still further recognized by the treaty of peace, amity, commerce and navigation of May 24, 1882, between the United States and Korea and, internationally speaking, the independence of Korea was then recognized by two of the great powers.

By the terms of the treaty the United States was admitted to trade in the three ports already opened to the Japanese, and to such as might be afterwards opened to foreign commerce; diplomatic and consular officers were to be received; provision was made for the case of shipwrecked vessels, and other usual stipulations of commercial treaties; traffic in opium was prohibited; and extraterritorial jurisdiction was given to American consuls, but the following provision was inserted: "Whenever the king of Chosen shall have so far modified and reformed the statutes and judicial procedure of his kingdom that, in the judgment of the United States, they conform to the laws and course of justice in the United States, the right of extraterritorial jurisdiction over United States citizens in Chosen shall be abandoned;" and the two countries were to be open to the residence, respectively, of the citizens and subjects of the other to pursue their callings and avocations. (John W. Foster: *American Diplomacy in the Orient*, p. 325.)

It is not without interest to note that the United States showed its friendly interest in the welfare of the Hermit Kingdom by proffering good offices in Article I of the treaty.

If other powers deal unjustly or oppressively with either government, the other will exert their good offices, on being informed of the case, to bring about an amicable arrangement, thus showing their friendly feelings.

The next year (1883) conventions were signed by representatives of Great Britain and Germany so that the independence of the kingdom was recognized by the world powers and the possibility of a formal adoption into the family of nations was held out to the land of Chosen.

But China looked askance on the new state of things and refused to renounce its claims of overlordship without a struggle. Taking advantage of the disordered conditions of the country Chinese troops were sent into Korea for the alleged purpose of putting down a rebellion which threatened to overthrow the Korean government. This action was claimed by Japan to be in violation of a treaty of 1885. A Japanese force occupied Seoul, its seaport, and fortified the connecting route. The rebellion was suppressed but the foreign armies remained.

China expressed a willingness to withdraw concurrently with the Japanese; Japan refused to withdraw until Korea should adopt such reforms in government as would prevent future disorders. The good offices of the United States by virtue of Article I of the treaty of May 24, 1882, were requested and extended, but the solution was reserved to the sword, not to diplomacy. The result was the war of 1894 between China and Japan. The war, as is well known, resulted in the overwhelming and crushing defeat of China, and its suzerainty over Korea was a thing of the past. The independence of Korea and the abandonment of all tribute and vassal ceremonies to China freed the land of Chosen from Chinese dominion. The independence, however, was

more in theory than in fact. A new master was substituted for the old.

A glance at the map shows the valuable geographical situation of Korea. Wedged in between China on the west, Russia on the north, with Japan ready to step from the island to the mainland, the condition of the kingdom was precarious. Unable to maintain and therefore to enjoy, its independence the question was, "Into whose lap should the prize fall?" Russia wished to give territorial unity to its possessions on the Pacific which would be effected by the permanent occupation of Manchuria and the subjection of Korea to its influence. If this should happen the ambition of Japan to secure a firm hold on the mainland and to establish an outlet for its population and a market for its industry would be frustrated. The forced renunciation of the Liaotung peninsula which Japan had wrested from China, the lease of Port Arthur to Russia by China showed in no uncertain way the intention of Russia. The Russian occupation of Manchuria as the result of the suppression of the Boxer movement made that more visible which was already plainly seen. A struggle on a large scale between Russia and Japan became a certainty.

In the meantime diplomatic methods were resorted to until the sword should be drawn. By a memorandum concluded between Japan and Russia signed at Seoul, March 14, 1896, the right of Japan was recognized to maintain her guards for the protection of her telegraphic lines between Fusan and Seoul. In this connection it should be observed that the right of Japan to construct railways between Seoul and Fusan and between Seoul and Chemulpo, and to maintain telegraph lines between these places was recognized by an agreement concluded between Japan and Korea, August 28, 1894. By the memorandum of May 14, 1894, Japan and Russia mutually recognized their right to station their respective troops for the protection of Japanese settlements in Seoul and the open ports of Korea on the one hand, and the Russian legation and consulates on the other. (For text of memorandum, see Supplement.)

Two years later, on June 9, 1896, a protocol was signed at Moscow between Japan and Russia which recognized the right of Japan and Russia to give advice to the Korean government in reference to the management of her financial affairs. The two governments agreed to give their support to Korea should it become necessary for her to raise loans. The two governments agreed not to interfere with the establishment and maintenance of her army and police system. Russia admitted Japanese right to control her own telegraph lines in Korea, and at the same time Russia reserved the right to establish a telegraph line from Seoul to

the Russo-Korean frontier. (See text of the protocol in the Supplement.)

Two years later, on April 25, 1898, a protocol was signed at Tokio by Baron Nissi and Baron Rosen, by which Japan and Russia recognized the sovereignty and independence of Korea and mutually agreed not to interfere in the internal affairs of Korea. The two governments also agreed between themselves not to take any steps regarding the appointment of military instructors and financial advisers for Korea without previously arriving at some understanding between the two powers. Russia recognized Japan's preponderating interests in Korea as regards commerce and industry, and agreed not to place any obstacle to Japan's commercial and industrial activities in Korea. (For the text of the protocol, see Supplement.)

On February 23, 1904, a protocol was signed by Mr. Hayashi and General Ye-Tchi-Yong at Seoul by which Korea agreed on the one hand to be guided by the advice of Japan in regard to improvements in administration while Japan on the other hand agreed to insure the safety of the imperial house of Korea and to guarantee the independence and territorial integrity of that country. In case the welfare of the imperial house of Korea or the territorial integrity of Korea was endangered, Japan agreed to take such measures as circumstance might require. For that purpose the right of Japan to occupy such places as may be necessary from a strategical point of view was recognized. The two countries agreed not to conclude with a third power without mutual consent any arrangement derogatory to the principle of this protocol. It will be recalled that war dating from the sixth of February already existed between Russia and Japan. (For the protocol, see the Supplement.)

On August 22 of the same year Japan and Korea entered into an agreement signed at Seoul which was the logical consequence of the protocol of February 23, 1904. Korea agreed not to take any important measures regarding finance and foreign relations without first taking the counsel of the advisers who should be recommended by Japan. In order to prevent for the future the conclusion of unwise and improvident engagements, Korea agreed to consult Japan before concluding treaties and negotiating conventions with foreign powers, and in dealing with any important matters in which the right of foreigners was involved such as the grant of concessions to foreigners. (For text of the agreement, see Supplement.)

So matters stood in 1904. The preponderating influence of Japan resembled absorption; the close of the year 1905 practically found Korea a dependency of Japan. Two important agreements were concluded

by the first of which, signed at Seoul April 1, 1905, Japan took over the control of the post, telegraph, and telephone services in Korea, and by the agreement signed at Seoul on November 17, 1905, Japan took charge of external relations of Korea, the latter agreeing not to conclude any act or engagement of an international character except through the intermediary of Japan. In other words, Korea surrendered her international status, having renounced her right to foreign representation except through the medium of Japan. (For the text of these important international agreements, see Supplement.)

The result of the decade between the conclusion of the Chinese war in 1895 and the treaty of Portsmouth in 1905 was the extinguishment of the independence of Korea and the establishment of a protectorate of the strictest kind known to international law. The establishment of the residency general and residencies in Korea by Imperial Ordinance No. 267 promulgated December 20, 1905, shows the nature and extent of the Japanese domination. While it may be considered a matter of municipal regulation it still has a great importance in international law. It is, therefore, printed in full in the Supplement.

That Korea has disappeared as an equal in the family of nations appears conclusively from the fact that at the conference of Geneva, Japan represented Korea as well and that the signature of the Japanese representative in his capacity as representative of Korea was promptly disavowed, Japan holding, and it would seem properly, that the signature of the Japanese representative sufficed. The following declaration presented formally to the president of the Swiss Confederation leaves no doubt as to the status of Korea from the Japanese point of view. On account of the importance of this document it is here printed at length and in French.

DÉCLARATION

Attendu que le Gouvernement Impérial du Japon, en vertu de l'accord intervenu le 17 novembre, 1905, entre le Japon et la Corée, a le droit de diriger entièrement les relations et affaires extérieures de la Corée,

Attendu que comme conséquence de l'état de choses susmentionné, la Corée a cessé d'avoir des relations ou des obligations internationales quelconques à l'égard de la convention de Genève du 22 août, 1864, ou des revisions quelconques qu'il la concernent, si ce n'est par l'intermédiaire du Gouvernement du Japon,

Attendu que l'acte d'inclure Sa Majesté l'Empereur de Corée comme une des hautes parties contractantes de la nouvelle convention de Genève du 6 juillet, 1906, et la signature apposée à cette convention par le Plénipotentiaire de Sa Majesté l'Empereur du Japon à titre de Plénipotentiaire la Sa Majesté l'Empereur de Corée étaient causées par la méprise du dit Plénipotentiaire et étaient d'ailleurs incompatibles avec la situation internationale dans laquelle la Corée se trouve actuellement,

Le Gouvernement Impérial du Japon ayant pour but d'écarter des doutes qui pourraient exister concernant la nature de ses relations avec la Corée, a autorisé le soussigné Chargé d'Affaires de Japon à Berne à déclarer ainsi qu'il suit:

Les parties de l'énumération dans le préambule de la dite convention du 6 juillet, 1906, et la signature dans la même convention qui font figurer Sa Majesté l'Empereur de Corée comme une Partie contractante de la dite convention, étant dans l'erreur et incompatible avec l'état réel des affaires, sont sans valeur ni effet et sont considérées par le Gouvernement Impérial du Japon comme nulles et non avenues.

Fait à Berne, le 15 octobre, 1906.

(sig.) GENSHIRO NISHI,
Chargé d'Affaires du Japon.

Pour copie, certifiée conforme,
Le secrétaire du département politique
de la Confédération suisse:

GRAFFINA.

Berne, le 23 octobre, 1906.

JAPANESE SITUATION

The editorial comment in a previous number of the JOURNAL (Editorial Comment, January number of the JOURNAL, pp. 150-153) discussed the principles involved in the exclusion of Japanese children from the public schools of San Francisco in general but it is hoped in sufficient detail. The good understanding between the United States and Japan has not been broken although perhaps for a period it was strained; and both nations preserved the attitude expected of those who deal with large questions and whose decisions are of moment to the rest of the world. The "hot-heads" of our country, those who, in the language of the distinguished southerner, are "invisible in war, but invincible in peace," rushed into print and the press teemed with the rights and duties of the citizens of the United States. It is to be presumed that the "invisible and invincible" class in Japan did the same. Thoughtful people, however, recognized the fact that a principle was involved and that this principle should be considered in its various aspects in the hope of reaching a solution satisfactory to both countries.

It would seem that the competition of the Japanese in the labor market is more to be feared than association with him in the class-room, and an exclusion of the Japanese laborers from the country was more desirable than their exclusion from the public schools. The representatives from the Pacific coast were willing to waive the question of the admission or exclusion of the Japanese to or from the public schools provided Japanese laborers should be excluded. This solution of the difficulty was seemingly acceptable to Japan for there seems to be no reason why Japanese laborers should at the present time seek employment so far

away from home. A clause therefore was added to the first section of the act to regulate the immigration of aliens into the United States, which reads as follows:

Provided further, That whenever the president shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the canal zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the president may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the canal zone.

The meaning of this clause is evident, namely, that when the president, by such investigation as he cares to make, finds that the presence of certain laborers, skilled or unskilled, is detrimental to labor conditions he shall then forbid their entrance. In accordance with the act, the president issued an executive order dated March 14, 1907, which is set forth at length:

WHEREAS, by the act entitled "An Act to regulate the immigration of aliens into the United States," approved February 20, 1907, whenever the president is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the canal zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the president to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or from such insular possession or from the canal zone;

And Whereas, upon sufficient evidence produced before me by the department of commerce and labor, I am satisfied that passports issued by the government of Japan to citizens of that country or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada and to Hawaii, are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

I hereby order that such citizens of Japan or Korea, to wit: Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.

It is further ordered that the secretary of commerce and labor be, and he hereby is, directed to take, through the bureau of immigration and naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect.

THEODORE ROOSEVELT.

The federal suit against the school board to uphold the admission of the Japanese has been dismissed as it was unnecessary; the San Francisco authorities pursuant to an agreement with the federal authorities rescind-

ed the obnoxious order excluding the Japanese, and the cause of friction between two great and representative nations seems to be removed. That no cloud may darken the horizon is undoubtedly the hope of the enlightened in both countries.

The school question has given rise to several interesting articles upon the treaty-making power of the United States.¹ In the *Green Bag* for January, 1907, Prof. Charles C. Hyde discusses the legal questions involved in the segregation of Japanese students; he intimates a belief that the treaty-making power of the federal government is unlimited. Prof. William Draper Lewis, writing in the *American Law Register* for February, 1907, agrees with the generally accepted principle that the treaty-making power is not limited to matters over which congress may exercise legislative power, and concludes that it is limited only by the express restrictions of the constitution, and by the implied reserved rights of the citizens of the United States; he thinks that the treaty-making power is not restricted, through implication, by the federal character of our government; the federal government

has power under the constitution to make a treaty with Japan or any other foreign nation, giving to the subjects or citizens of the foreign nation residing in one of the states the right to attend the public schools of the state on the same terms as native or naturalized citizens.

Prof. Simeon E. Baldwin, in the *Columbia Law Review* for February, 1907, expresses views similar to those of Professor Lewis. In the *Columbia Law Review* for March, 1907, Mr. Arthur K. Kuhn concludes that there are no restrictions upon the federal treaty-making power and that

the unrestricted exercise of the treaty power is essential to the central government as representing the nation and its sovereignty over and against foreign nations.

All of these writers agree that the United States has the power to confer schooling privileges in the state schools upon Japanese students, but none of them expresses an opinion as to whether the treaty actually confers such privileges. In a very careful and sane article by Theodore P. Ion, in the *Michigan Law Review* for March, 1907, it is contended on authority and reason that the treaty does not confer the right of education in the public schools; that the state of California performs its international duty, supposing the Japanese have the right claimed, by furnishing equal, not identical, facilities; that foreigners cannot well claim to enjoy in this country greater rights and privileges than native

¹ See list of articles in "Periodical Literature."

born citizens of the United States enjoy, referring especially to the situation of the negro.

Mr. T. Baty, in the *Law Magazine and Review* (of London) for February, 1907, examines the text of the treaty, and expresses the positive opinion that no infringement of Japanese rights, contractual or real, can be said to have been committed.

THE NEW IMMIGRATION LAW

The bill "to regulate the immigration of aliens into the United States" which was introduced during the first session of the fifty-ninth congress, finally became law on the twentieth of February, 1907, after extended debates in both houses. The measure was considered with minute care and was subjected to thorough scrutiny by senators and representatives alike. Certain differences of opinion were early manifested relative to important sections of the proposed enactment which resulted in mutual concessions before the bill became law, but as finally enacted it is a distinct advance upon the existing legislation.

The act of March 3, 1903, which was the existing law on the subject of immigration prior to the recent enactment, was a revision of former laws on the same subject theretofore in force. The act of February 20, 1907, is an amendment and extension of the act of 1903. Many of its provisions have been incorporated into the new law without change. In many places insertions have been made in accordance with the principle of selection upon which our immigration system is founded, while other additions may be explained upon general reasons of policy. The more important changes include an increase in the "head tax" so-called; certain additions to the excluded classes; a provision defining contract laborers; a check upon the padrone system; an increase in the amount of air space allowed to steerage passengers in steamships; the correction of an apparent variance between certain sections of the law heretofore in force relating to the time within which deportation can take place so as uniformly to extend the period to three years in all cases; the creation of a bureau of information to facilitate the distribution of immigrants throughout the United States; the formation of a commission to examine and report to congress upon the subject of immigration, and the project of an international immigration conference, or in lieu thereof, the appointment of special commissioners to visit foreign countries and enter into agreements with them for the purpose of obtaining their coöperation in carrying out our immigration laws. Many other changes were made, perhaps of minor importance, but nevertheless useful, which show the

care bestowed upon their task by those having the matter in charge. The addition of two important sections providing for a financial qualification and an educational test, were rejected, the former in the house of representatives and the latter in the conference between the two houses of congress.

The principle upon which our immigration statutes rest may be stated very simply. This country has a use for every able-bodied man of good character and good principles that may apply at our doors for admission, and such a one shall receive a welcome; but no others need apply, and it is the purpose of our laws to keep out these others. The law of 1903 was based upon this principle. Its purpose was to cause a most thorough examination to be made of all aliens seeking to become residents of the United States. Should an objectionable applicant appear he was to be excluded, whether the objection was of a physical, mental or moral nature. The law of 1907 has aimed to carry still further this principle of selection. As Senator Dillingham said in introducing the measure, we should

permit only those to enter who are sound in mind, sound in body, sound in morals, and fit to become fathers and mothers of American children.

The restrictions now added to the statutes have this great end in view, and there would seem to be no doubt that our immigration law, by virtue of this recent act of congress, is now simpler, better, and more efficacious.

The first important change made by the new law is to raise the tax upon aliens entering the United States from two dollars to four dollars for each person so entering. A tax of fifty cents was imposed upon every immigrant by the act of 1882, which was afterward raised to one dollar, and under the act of 1903 it was increased to two dollars. By the present law this tax is now doubled. This increase was adopted largely owing to the belief that it would reduce the number of undesirable applicants for admission. While it would not prevent all prospective immigrants of this class from coming to this country, the payment of the additional tax would doubtless be a consideration to the incompetent and undesirable, and it is believed that it will deter the shipment of paupers and criminals.

By the terms of one of the provisos annexed to the first section of this act its provisions

shall not apply to aliens arriving in Guam, Porto Rico, or Hawaii.

This clause was adopted in view of the belief that these island possessions of the United States were proportionally more in need of immi-

grants than the mainland and that the same danger from excessive immigration did not exist there, but in order to preclude the possibility of the evasion of the tax should an alien who had landed thereon afterward come to the United States, it was declared that

if any such alien, not having become a citizen of the United States, shall later arrive at any port or place of the United States on the North American continent,

he should be subjected to the tax.

The final proviso of the first section of the new law is significant, which gives power to the president to refuse entrance to our mainland to aliens who have passports from their government permitting them to go to our island possessions or to the canal zone. The purport of these words will be found elsewhere treated in the pages of this JOURNAL.

The additions made to the excluded classes in §2 of the new law seem to be abundantly wise. These additional classes for whom exclusion is now provided include imbeciles, feeble-minded persons, persons who have been insane within five years previous to immigration, and persons afflicted with tuberculosis. As it was found in practice that a class, of considerable proportions, has heretofore been admitted who are highly undesirable on account of their general anæmic condition or low vitality, but who nevertheless did not come under any of the restrictions of the old law or had been otherwise specially excluded under the new, a clause was incorporated including

persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living.

But the rigor of this and of other prescriptions of this section is materially lessened by the terms of §26 which provides that the alien may give bond against his becoming a public charge.

Certain amendments were also added with a view to the strengthening of the contract labor laws. Contract laborers were defined to be

persons * * * who have been induced to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled,

and adequate measures are enacted for their exclusion. During the debates in congress, it was developed that the United States immigration officials had not for years been able properly to enforce these laws, and the object of the amendments was to make possible such enforcement, so as to carry into effect the purposes that congress had in view when it enacted them originally.

Another clause in §2 is intended to do away with the so-called "padrone system," under which men bring here, from Italy and other countries, boys from twelve to sixteen years old and control their lives and earnings until they become of age. It provides for the exclusion of all children under sixteen years of age unaccompanied by one or both of their parents, at the discretion of the secretary of commerce and labor or under such regulations as he may from time to time prescribe.

A subsequent section (§11) provides for the exclusion of an alien who accompanies a rejected alien as his protector or guardian, and prescribes that the steamship company shall return him

in the same manner as vessels are required to return other rejected aliens,

that is, without cost to the immigrant. This provision was enacted for humanitarian reasons at the instance of our immigration officials. Still another section (§25) alters the law regarding the finality of the decision of the immigration authorities or of the secretary of commerce and labor upon a question of exclusion. Heretofore, by virtue of the old statute, such a decision was prescribed to "be final," and it has been contended that the decision, when once rendered, could not be reopened, even in case it developed, after the alien's admission, that he had been admitted unlawfully. To remedy this defect, the new law states that decisions of the authorities shall be final only when adverse to the immigrant. It also provides (§12) that lists of outgoing aliens shall be kept, so that henceforth it will be possible for the immigration authorities, by comparison of their lists of incoming and outgoing passengers, to determine the excess of the one class over the other, so as to ascertain the net amount of immigration during any period.

We come now to what may be called the distinctive features of the new law, namely, the provisions for a bureau of information for the benefit of the immigrant, for an immigration commission, and the project of general or special negotiations with foreign countries concerning immigration into the United States. Section 40 of the new law gives authority to the commissioner general of immigration, under the direction and control of the secretary of commerce and labor, to establish a division of information whose duty it shall be

to promote a beneficial distribution of aliens admitted into the United States among the several states and territories desiring immigration.

It is further provided that

correspondence shall be had with the proper officials of the states and territories and such division shall gather from all available sources useful information regard-

ing the resources, products, and physical characteristics of each state and territory and shall publish such information in different languages and distribute the publications among all admitted aliens who may ask for such information at the immigrant stations of the United States and such other persons as may desire the same;

and that where any state or territory maintains an agent to represent it at an immigrant station, such agent should, subject to the rules of the department of commerce and labor,

have access to aliens who have been admitted to the United States for the purpose of presenting either orally or in writing the special inducements offered by such state or territory to aliens to settle therein.

Most of the incoming immigrants know before they leave home where they expect to locate in the United States, but a large number who come do not know where to go, and the object of the new clause is to obtain information which will be helpful in making a choice. This information would include details as to the climate and soil of the different parts of the United States, the price of land, the route and cost of travel and the rate of wages. Under existing conditions, certain states, such as New York, Pennsylvania, New Jersey and Massachusetts and perhaps a few others, have attracted more immigrants than other states, because more accessible to the point of debarkation. The object of the new provision is to bring to the immigrant a knowledge of the attractions of the other sections of our country. The south is in special need of desirable immigrants to work its cottonfields and to develop its great and constantly growing manufacturing and mining industries, and at least one southern state maintains an agent in Europe in order to induce desirable immigrants to go thither. It is proposed by this new legislation to lay the attractions and inducements of all parts of our country before all immigrants that desire such information, without favor to any section. This measure has strongly appealed to both branches of congress and it is considered that its enactment into law will be distinctly beneficial.

Almost the final touch given this great measure by the law-makers was to provide that a commission shall be created, consisting of three senators, three representatives, and three persons to be chosen by the president, to

make full inquiry, examination and investigation by sub-committee or otherwise into the subject of immigration.

The commission has full authority to examine witnesses, administer oaths, send for persons and papers, make all necessary travel both in the United States and abroad, and to employ needful clerical and other

assistance. An abundant provision is made for payment of expenses, so as to make effective the commission's powers. The law states that the commission

shall report to the congress the conclusions reached by it and make such recommendations as in its judgment may seem proper.

This provision was adopted in lieu of an educational qualification. The senate had embodied in its bill a clause denying admission into the United States to all immigrants over sixteen years of age who could not read the English language or some other language. The measure was opposed in the house of representatives upon the ground that it was violative of the fundamental principles upon which our immigration laws are founded, and substituted a certain degree of intellectual proficiency for the basic qualification of physical, mental and moral soundness. It was represented that the immigration question was now not so much a problem of restriction as it was one of proper distribution, and emphasis was laid upon the fact that many sections of our country are clamoring for immigrants. It was urged that, inasmuch as it had been twenty years since a thorough investigation had been made into the subject, it would be eminently desirable to conduct such an investigation before enacting any drastic innovations upon existing law. The reasoning of the house conferees prevailed over those of the senate and the "illiteracy test," so-called, went out of the measure, and the project of a commission to examine and report upon the whole immigration question was substituted therefor. The commission has already been named and the list of members is a sufficient guaranty of the thoroughness with which their work will be done.

But the law went further than this; for it authorized the president, in the name of the government of the United States, to call, in his discretion, an international conference, to assemble at such point as may be agreed upon, or to send special commissioners to any foreign country, for the purpose of regulating by international agreement, subject to the advice and consent of the senate of the United States, the immigration of aliens to the United States; of providing for the mental, moral and physical examination of such aliens by American consuls or other officers of the United States government at the ports of embarkation, or elsewhere; of securing the assistance of foreign governments in their own territories to prevent the evasion of the laws of the United States governing immigration to the United States; of entering into such international agreements as may be proper to prevent the immigration of aliens who, under the laws of the United States, are or may be excluded from entering the United States, and of regulating any matters pertaining to such immigration.

It has been realized that the coöperation of foreign countries is not only desirable but necessary if we would seek to bring our immigration

laws to the highest state of efficiency. It would be of great advantage if, for instance, foreign governments would grant to our consuls the privilege of examining prospective immigrants, prior to their embarkation, with sufficient thoroughness to prevent the departure of such of them as appear under our laws to be liable to exclusion. Since this purpose, as well as any more active assistance on the part of a foreign country, can best be accomplished by international agreement, authority has been given to the president to call in his discretion an international conference with the view to the conclusion of a general convention on the subject of immigration into the United States, or, in the alternative, the president may send commissioners to foreign countries to make special agreements with them to the end that they may recognize and aid the United States in the enforcement of its immigration laws.

It is to be noted that one of the concluding paragraphs provides that nothing in this act shall be construed to apply to accredited officials of foreign governments nor to their suites, families, or guests.

The committee on immigration of the house of representatives, in their report on the bill, make the pertinent comment that

it is exceedingly probable that international law already exempts officials of foreign governments from our immigration laws.

In other words, the provision is intended to be merely declaratory of the great principle of the law of nations which exempts from the local jurisdiction the diplomatic representatives of a foreign state and their official household. The exemption has been extended by the present law to their guests as well, as it was realized that such an exemption would not be abused. Every instance of the recognition by this government of the doctrines of the common law of nations in our system of positive law should be regarded as significant. Especially does it encourage the aims and objects toward which the Interparliamentary Union is striving, and of the great movements which make for the peace of the world. It makes it possible to hope that, in the evolution of international relations, there may spring forth a code of positive law, made and sanctioned and obeyed by the enlightened powers of the earth, which will become the uniform and supreme law by which the dealings of state with state will be judged.

THE NEW CITIZENSHIP LAW

The congress which passed the naturalization act (printed in Supplement, January number, pp. 31-47) has had the good fortune to round out its labors with an act on citizenship, by means of which the law of

the United States regarding these two subjects is in a more satisfactory position than in any other period of the country's history. Notwithstanding the fact that our country has been peopled and developed by persons directly or indirectly of foreign origin, and notwithstanding the fact that it has been the policy of our government to claim consistently and persistently the right of these immigrants to renounce allegiance to their parent government by becoming citizens of the United States, and notwithstanding the further fact that congress in 1868 solemnly declared the right of citizens to expatriate themselves, it is indeed remarkable that no statute prescribed the manner in which expatriation should be performed so that the citizen might free himself from an irksome allegiance. The explanation is perhaps to be found in the fact that we have been too busy putting the houses of others in order to attend properly to our own, or, in other words, our attention has been called to the rights of foreigners to expatriate themselves in favor of the United States while there are comparatively few instances of American citizens seeking to renounce American citizenship. The necessity of legislation was apparent to all thoughtful people. To take an example from the many that might be selected. For instance Grant said in his annual message of December 5, 1876:

The United States has insisted upon the right of expatriation, and has obtained, after a long struggle, an admission of the principles contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted governing such cases and providing how expatriation may be accomplished.

While emigrants in large numbers become citizens of the United States, it is also true that persons, both native born and naturalized, once citizens of the United States, either by formal acts or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these questions. * * * The delicate and complicating questions continually occurring with reference to naturalization, expatriation, and the status of such persons, as I have above referred to, induce me to earnestly direct your attention again to these subjects.

The recent congress has remedied these evils by a statute approved March 2, 1907, the second section of which reads as follows:

Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

It is a noticeable fact that American young women of beautiful parts and ample fortunes have insisted on conferring themselves and their

purses upon impecunious foreigners. The union ordinarily ends by mutual separation or by the action of the divorce court. The young woman has experience, the foreigner has the purse. What is the status of this woman? As long as the married relation remains she is a foreigner. Should the husband die she is released from her bondage and with it the citizenship acquired. Any doubt previously existing as to the status of such a person is set at rest by §3 of the act which provides:

Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The status of a foreign woman who acquired American citizenship by marriage has been the source of no little difference of opinion. It is admitted that during coverture she is an American citizen and as such entitled to all the rights and privileges of citizenship. Upon the dissolution of marriage by death or divorce one view would hold the widow to be a foreigner, another would permit her to retain her American citizenship. The statute in §4 has likewise settled the status of the foreign woman.

Sec. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

The citizen owes allegiance to the government, the government likewise owes protection. When the citizen remains at home there can be no conflict for the duty and protection are at his door. Should he go abroad he passes from the domain of the United States into a foreign jurisdiction and it is familiar knowledge that residence in a foreign country demands of the resident a temporary allegiance not inconsistent with the paramount tie to the home country, and in return for this temporary allegiance the foreigner receives a protection conditioned upon residence. We have, however, two classes of citizens, the natural and the made. The first class gives us comparatively little trouble, because no country other than the country of birth has ever had a claim upon their service. With a naturalized citizen it is different. He frequently visits the land of his origin after having amassed a competency. Not unfrequently he decides to reside permanently in this country. It may be

that he left the country with military service unperformed. It may be a family has grown up or is growing up and the parent is as unwilling to have his children serve in the army as he was in his un-American days. The country of his origin finds his presence embarrassing because it shows to the native the way to escape a duty, and the way to enjoy life when a competency has been amassed in foreign parts. It is to the evil example of the young that the family of the emigrant should be exempt from military duty. A conflict arises sooner or later. Indeed this conflict has at times threatened to endanger the pleasant relations which should exist between members of the family of nations.

To prevent this kind of a conflict from arising the statute declares that a two years' residence in the foreign state from which he came or five year's residence in any foreign state shall raise a presumption that a naturalized citizen has renounced his American citizenship, or to quote the words of the statute:

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the department of state may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

There is an intermediate stage between the declaration of an intention to become a citizen and the acquisition of citizenship. The declaration of intention is unscientific and irksome. Congress has, however, refused to abolish it. The result is that the applicant for citizenship must reside five years in the United States and that at least for two of these years he must occupy the embarrassing position of one who has declared his intention to renounce foreign allegiance without having acquired citizenship of the state of his choice. He performs the duties incumbent upon a resident of our country. He receives the protection due to residence and in addition thereto he is endowed with many of the rights and privileges of citizenship. Should he wish to leave the United States for a short period or should it be necessary for him to spend a few months in foreign parts his situation is trying and embarrassing. He cannot well apply to the country of his origin for a passport because he has declared his intention of renouncing all allegiance to that country. He cannot apply to the United States for a passport of citizenship for he is not a citizen. If a passport be required to enter the country which he intends to visit he must choose, perforce, between the

old and the new love. To remove the applicant from his predicament, the last congress had the courage of its convictions, for it authorized the secretary of state to issue passports to declarants which should be valid for a period not to exceed six months in a foreign country other than the land of the applicant's birth.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the secretary of state shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years, a passport may be issued him entitling him to the protection of the government in any foreign country: Provided, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

Congress could not well do less if the declaration of intention be retained. It could not do more because it could not protect the declarant in the land of his origin, without assuming a concurrent jurisdiction. The proper solution of the question would be it would seem, to abolish the declaration of intention. A foreigner would need to remain five years continuously in the United States, but there would be this advantage, namely, that he remains a citizen of the land of his origin until he has acquired a citizenship in the United States. There would be no period of time in which he would be an international derelict.

THE QUESTION OF EXPULSION

Every now and then newspapers inform the public that an American citizen has been expelled from some foreign country in which he had taken up his residence, that the expulsion was without cause, that no reason was given for the expulsion other than that the resident was an undesirable person, and that no time was given the expelled person to collect and to dispose of his effects. The statements in the paper are undoubtedly accurate, for cases of expulsion do occur, but the acts are usually exaggerated and the law is not always clearly understood or properly interpreted.

If it be admitted that all members of the family of nations are sovereign and equal—Chief Justice Marshall declared that "Russia and Geneva have equal rights" (*The Antelope*, 1825; 10 Wheaton 66, 122)—it necessarily follows that a nation has a right to choose who shall be its citizens and it likewise follows that a nation shall decide and must decide for itself whether or not the presence of foreigners conduces to the politi-

cal, industrial or social well-being of the commonwealth. If a state wishes to shut itself up from the rest of the world, it may, legally speaking, so do, but if foreigners are admitted it is well settled by international law that there can be no discrimination between foreigner and foreigner as such. All foreigners must be treated alike and discrimination against one foreigner in favor of another of a different race leads inevitably to a claim against the state guilty of the unfriendly act.

In the absence of discrimination, foreigners may well stand upon a different footing. They cannot claim political rights, for those rights are incident to citizenship. It may be that the holding of land is subjected to certain conditions or it may be that a particular form of industry is reserved for the native. But the foreigner when admitted is entitled to a protection co-extensive with the temporary allegiance he owes by reason of his residence. He should enjoy personal liberty, his property must be protected, and he should not be discriminated against in courts of justice. The state may prescribe the terms upon which foreigners are admitted, but when the foreigner complies with those terms it would seem that the government cannot proceed against him or eject him without incurring liability. It is perhaps unnecessary to cite authority for the proposition that a nation may prescribe the terms of admission within its borders and that aliens failing to comply with such conditions have no inherent right under international law to enter such territory. Three important adjudged cases may be mentioned and a quotation from a well-known treatise on international law to show the nature and extent of the right.

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. (Vattel: lib, 2, §§94, 100; I Phillimore: 3d ed., c. 10, §220). In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and the senate, or through statutes enacted by congress. (*Nishimura Ekiu v. United States*, 1892, 142 U. S., 651, 659. See also *Knox v. Lee*, 12 Wall. 457; *Fong Yue Ting v. United States*, 1893, 149 U. S., 698).

In *Turner v. Williams* (1904, 194 U. S., 279), the supreme court of the United States held that it was constitutional and declared the power to expel inherent in sovereignty. In the same way Great Britain has held under international law, as well as by statute, that an alien has no legal right, enforceable by action, to enter British territory. (*Morgrove v. Chung Teeng Toy*, 1891, L. R. App. Cas. 272):

Each sovereign state is free to prescribe the conditions upon which aliens may enter and reside within its territory. The right of nonadmission, as of expulsion, is a direct consequence of territorial sovereignty. A nation may subject the residence of aliens within its territory to exact the determined conditions. May it interdict, completely, immigration? May it close its territory, absolutely, to the alien? China and Japan long observed this policy. Europeans obliged them to conclude treaties opening certain ports and permitting access of aliens to certain provinces. This was, however, the employment of force; not the application of law.

A state has the right to expel from its territory aliens, individually or collectively, unless treaty provisions stand in the way. In ancient times, collective expulsion was much practiced. In modern times it has been resorted to only in cases of war. Some writers have essayed to enumerate the legitimate cause of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: *the public interest of the state*. Bluntschli wished to deny to states the right of expulsion, but he was obliged to acknowledge that aliens might be expelled by a simple administrative measure. (French law of December 3, 1849, arts. 7 and 8; law of October 19, 1797, art. 7). An arbitrary expulsion may nevertheless give rise to a diplomatic claim. (Bonfilis: *Manuel de Droit Int. Public*, §§441, 442.)

Admitting, therefore, as we needs must, that a foreigner may not enter a sovereign state without permission of the sovereign, and that the alien's residence within that foreign country is conditioned upon obedience to the law which may be established concerning his residence, the question arises: "How may he be removed from this country when his presence becomes dangerous or undesirable?"

While a sovereign state may do a sovereign act, it does not follow that the state is not liable for the consequences of such act. Were this not so, sovereignty would be a complete defense to any claim against a foreign government whether through the channels of diplomacy or before an international court. It follows then that the sovereign act must be done in a particular way, if the state is to escape liability. The correct principle would seem to be that the state expelling the alien should do so only when his presence is against the public good; that proof or evidence of this should be given, otherwise the mere statement would suffice to ruin a man's fortune, without any possibility of redress; that the reason for expulsion should be communicated to the alien resident in order that he might be able to overcome the reason by showing the falsity of the accusation; that the alien be given a reasonable time within which to dispose of his effects, for it cannot be supposed that an enlightened government would seek to ruin him in person or fortune. The alien is expelled because his presence is dangerous or undesirable, to deprive him of the opportunity of disposing of his property would inflict financial loss upon him, and it is difficult to see how his financial ruin would in any way benefit the state. The only justification for

immediate expulsion would seem to be that the presence of the alien has become so undesirable or dangerous that a continuance of the residence although for a limited time would injure the public to such a degree that it could not well be granted. And, finally, the reason should be communicated to the government whereof the expelled alien is a citizen, for an injury to the citizen is an injury to his state, for which reason it is that an insult to the citizen is an insult to the state, and may, unless redressed, possibly lead to redress by force.

Treaties of international law are in accord with this doctrine and supply apt illustration. Decisions of courts of arbitration have given full effect to these principles and have assessed damages against the offending state. Reference is especially made to the Buffalo Case as decided by Mr. Ralston and reported by him in the *Venezuelan Arbitrations* of 1903. After citing the various authorities, for example, the opinion of Rolin-Jaequemyns in the *Revue de droit international*, vol. 20, p. 498; Bluntschli's *Droit international Codifié*, articles 383, 384; Professor von Bar, *Journal de droit international privé*, vol. 13, p. 6; Woolsey's *International Law*, §63, p. 85; Hall's *International Law*, p. 24, the learned umpire summed up his conclusion as follows:

1. A state possesses the general right of expulsion; but,
2. Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected.
3. The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accept the consequences.

This case is heartily commended to any who may wish to consider a concrete case in detail.

TRANSIT IN EXTRADITION CASES

Opportunities for the criminal of the present day to escape the consequences of his crime by removal to foreign parts are becoming gratifyingly few. Governments are every year seeing more clearly the wisdom of the conclusion of liberal extradition treaties and of a liberal spirit in their interpretation. Every year new treaties are being made or supplementary treaties entered into covering new crimes, the prevalence of which is a result of the commercial, industrial or political activity of the past two or three decades.

In marked contrast with the present practice is the attitude of the United States government during the first half century of its growth.

With one inadequate and temporary exception¹ the United States had not negotiated a single extradition treaty prior to 1842. To such an extent did our forefathers carry their theory of human liberty that they allowed this country to become a sanctuary for offenders from Europe who fled to our shores. Rightly or wrongly, they held the political systems of Europe responsible to a considerable extent for the criminal conditions there existing, and resolved not to deliver to a supposedly doubtful justice an offender who had escaped from its oppressiveness and had found a refuge where the rights of man were held sacred; and even after the adoption of the early treaties it was often still the policy of our executive and judicial authorities to give to a treaty of extradition the narrowest construction consistent with our treaty obligation and resolve any doubt in favor of the fugitive. But as international relations have become more intimate and the necessity of the suppression of crime has become more urgent, a feeling of mutual confidence in the government and institutions of our foreign neighbors has succeeded to that of suspicion, and the courts very generally, as well as the executive, have inclined to a more liberal and enlightened policy of surrender wherever possible. The result has been to cause the prospective malefactor of today, who has a care for his future immunity, to look well to the maps, to the treaties, to foreign laws and even to foreign practice before he begins to plunder.

To have the United States among the foremost of the powers in its attitude toward a liberal and enlightened system of extradition has been the object of the department of state for many years. Its efforts have been reasonably successful most of the time; but some problems still remain which it would be highly desirable to solve, and which, in some cases, are comparatively easy of solution.

Among these problems is the question of transit. When a fugitive is being returned from the surrendering to the demanding government, it not infrequently happens that it is convenient and sometimes necessary that he be taken through the jurisdiction of a third country. The question immediately arises, by what authority of law is he restrained of his liberty while in the country of transit? In the United States, where the territorial theory of crime prevails, as distinguished from the personal jurisdiction theory, a person cannot lawfully be deprived of his liberty except on account of a violation of law of the United States or of the states or territories of the Union, or by virtue of treaty stipulation. A

¹ The twenty-seventh article of the treaty of 1794 with Great Britain provided for extradition for the crimes of murder and forgery, but this provision expired by limitation in 1807.

treaty of extradition between the United States and a foreign country is the only authority for the detention of a foreign fugitive from justice, and our treaties will be found to look merely to the extradition of a person who has taken refuge here, and take no account of his status if he is merely passing through the United States in the custody of an officer.

An exception to the usual practice seems to have been contemplated in the negotiation of our treaty with Mexico of 1899, and it is provided therein (Article XVI) that a fugitive not being a citizen of the country of transit, who has been surrendered by one of the contracting parties to a third power, may be conveyed in transit across the territory of the other contracting party upon complying with certain formalities. The article, however, provides that it shall not take effect until the congress of each country shall by law authorize the transit, and the congress of the United States has never enacted such legislation to carry this treaty provision into effect. Hence under the conditions now obtaining in the United States, even though the government to which the fugitive is being returned may have a treaty in force with the United States covering the crime for which he is being surrendered, this government may surrender such person only upon compliance with the treaty requirements, which are not fulfilled in the ordinary case of transit through its territory. The only manner in which a prisoner under such circumstances can, in the full strictness of the law, be conveyed across United States territory is for the demanding government to institute formal extradition proceedings in this country in accordance with treaty requirements.

In default, therefore, of both law and treaty sanctioning transit across our territory, it is clear that any fugitive being so conveyed may be set at liberty upon resort to *habeas corpus* proceedings. The same principles obtain in England.

The existence of this rule in other countries has sometimes worked considerable inconvenience to the United States and has necessitated the making of special arrangements for the return of a fugitive where the vessel conveying him must stop at an intermediate port. In a case occurring in 1904, where the department of state had requested an extradition from the authorities of Argentina and the vessel upon which the fugitive was to be conveyed to this country had to call at a port of Brazil, the department directed its ambassador to apply to the Brazilian government for the provisional detention of the fugitive in case he should attempt to secure his release upon *habeas corpus* or analogous proceedings. Once, in a case of transit across the Isthmus of Panama, the fugitive was permitted to escape altogether.

It would seem *a fortiori* to be beyond question that the territorial sover-

eign has the right to interfere upon its own account because of the violation of its jurisdiction, to effect the release of the person under arrest. But in practice a distinction is made between the existence of this right and its exercise by the United States. No government, by reason of a supersensitiveness of its rights of sovereignty should use its power to thwart the ends of justice by promoting the escape of a criminal. In these cases the department of state does not interfere to secure liberty for a prisoner by reason of a technical violation of its jurisdiction, but leaves the prisoner to avail himself of the remedy afforded by the laws of the country, without interference or suggestion upon its part. As an instance of this attitude it may be stated that twice in recent years, when application has been made by the British ambassador, on behalf of the Canadian authorities for leave to take prisoners through United States jurisdiction from one part of Canada to another, the department has stated that it was not disposed to object to such transit, but that it reserved entire freedom of action in case of appeal on behalf of the fugitive. The department has at other times stated that no action upon its part could prevent the recourse which the prisoner had to his writ of *habeas corpus*.

In many of the states of Europe and South America the custom exists of allowing transit upon more or less liberal conditions, and in most of them the practice is founded upon law and treaty. Some countries prescribe that the request shall be made through the diplomatic channel, and some require the presentation of the documents for extradition, such as a certified copy of the warrant of arrest, and some governments merely provide that a properly authenticated copy of the warrant of surrender shall be produced. Provisions or regulations for the return of fugitives in transit have been made by the Argentine Republic, Belgium, France, Italy, Japan, Luxemburg, Mexico, the Netherlands, Portugal, Russia, Spain, Sweden, and Turkey.

The question of the amendment of our extradition statutes so as to make suitable provision to preclude the escape of fugitives from justice in transit through the United States in process of delivery by one foreign government to another has been made the subject of recommendations to congress by two different presidents. In his second annual message of December 6, 1886, President Cleveland said:

Experience suggests that our statutes regulating extradition might be advantageously amended by a provision for the transit across our territory, now a convenient thoroughfare of travel from one foreign country to another, of fugitives surrendered by a foreign government to a third state. Such provisions are not

unusual in the legislation of other countries, and tend to prevent the miscarriage of justice.

And President McKinley, in his second annual message of December 5, 1898, renewed the recommendation of his predecessor.

No legislative action has resulted from either of these recommendations, nor, in the case of our treaty with Mexico, where it was specially stipulated that a clause permitting transit rights should await the action of congress to make it effective, has any step been taken toward the desired end. It would seem useless to argue in favor of the advantages of such an enactment. It is hoped that in the near future, legislation with this object in view will become an accomplished fact. Let it not be said that the United States is behind other nations in the punishment of crime; and let it be made plain, that in the mind of all thinking people, a common criminal is an enemy of the human race, an international outlaw, to be seized wherever he may be found, and returned without let or hindrance by the most convenient way to the country against whose laws he has transgressed.

EXTRATERRITORIALITY AND THE UNITED STATES COURT FOR CHINA

In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted; and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as their fathers were—*Doris amara suam non intermiscuit undam*—not acquiring any national character under the general sovereignty of the country. (Lord Stowell in the *Indian Chief*, 1801, 3 Charles Robinson, p. 12).

Extraterritorial jurisdiction is a survival of, or a reversion to, the time when sovereignty was personal rather than territorial, when there was a king of the English rather than a king of England. It means the establishment of an *imperium in imperio*. It means the legal recognition of the existence of a foreign colony in a native state whose members remain in the picturesque language of Lord Stowell, "immiscible," perpetuating their own institutions, governed by their own laws and responsible to their own officers.

Secretary Frelinghuysen in defining extraterritoriality with special reference to the practice of the United States described it as a condition in which

the national sovereignty of law is transferred bodily into a foreign soil and made applicable to citizens or subjects of its own nationality dwelling there. (Letter to

Hon. William Windom, chairman of the committee on foreign relations, United States Senate, April 29, 1882, Senate Miscellaneous Documents, 89, 47th Congress.) First Session, p. 1.

Extraterritoriality is of ancient origin.

The consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe and the prevalence of civil order in the several Christian states have had the effect of greatly modifying the powers of the consular office. (*Denise v. Hale*, 91 U. S. 1516.)

But the peculiar status of the municipal colonies organized by the Latin Christians and especially by those of the Italian republics in the Levant, growing out of the racial antipathies and still keener religious rivalry between the Latin merchants and the Greeks among whom they settled and traded, perpetuated the original jurisdiction of the consular office long after it had lost its political significance in the western world. (See opinion of Atty. Gen. Cushing, 7 Opinions Atty. Gen. 342, at 346.)

The coming of the Mahomedan only increased the necessity for extraterritoriality. Mahomedan religion and Mahomedan law were indissolubly connected. The perpetuation of extraterritoriality, far from being regarded as a concession to the strength and superior intelligence of the western Christians, was an inevitable consequence of the unwillingness of the Mahomedan courts to attempt to administer justice among aliens who were not merely enemies but were regarded as unclean. The Mahomedan refused to extend his law over the western Christians for a reason not unlike that which has prevented the United States from extending its laws over transactions between Indians upon Indian reservations. (See Sec. Bayard to Mr. Straus, Foreign Relations, 1887, pp. 1094-1095.)

During the centuries immediately preceding the discovery of America, the Italian republics obtained from the Christian emperors, and later from their Mahomedan conquerors, numerous charters granting protection for commerce and exemption from local administration, for their mercantile colonies in the Levant. These charters consisting of articles or "capitula" acquired the name of "capitulations," a term now in general use to denote the early treaties by which Turkey conceded extraterritoriality to the nations of the western world. (Hinckley: *American Consular Jurisdiction in the Orient*, pp. 2 and 3). In this manner, extraterritoriality has gradually changed from the rule to the exception. The powers of the consular office have dwindled until

it may now be considered as generally true that for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express pro-

visions of the treaties entered into with that nation and to the laws of the states which the consuls represent. (*Denise v. Hale, supra.*)

When the United States became a nation it found the system of extraterritoriality already firmly established in usage and secured by treaty provisions between the nations of the Orient and the western powers. Just as the United States accepted international law itself, so it accepted the principle of extraterritoriality and at once proceeded to negotiate treaties securing for its citizens exemption from local jurisdiction in the semi-barbarous countries of the Orient. The United States early negotiated treaties securing the privileges of extraterritoriality in various minor Mahomedan states; the treaty with Morocco being negotiated in 1787; with Tunis, 1797; with Tripoli, 1805; and with Algiers, 1815. Indeed, it is a curious and interesting fact that one of the earliest treaties recognizing a qualified form of extraterritoriality was concluded between the United States and France, namely the treaty of November 14, 1788, negotiated by Jefferson, which contains a provision that all differences and suits between citizens of the United States and France shall be determined by the American consuls and vice consuls, either by reference to arbitrators or by summary judgments without costs.

It was natural, if not inevitable, that when the barriers of exclusion within which China and Japan had isolated themselves for centuries gave way and a limited intercourse with the western world was permitted, that the principle of extraterritoriality should be included in the treaties securing to the citizens of the western nations the right to reside and carry on trade within the treaty ports. China conceded extraterritorial privileges to Great Britain in 1842 and 1843, and to the United States in 1844, while Japan conceded civil extraterritoriality to the United States in 1857, and in the treaty of 1858 provided for extraterritorial jurisdiction in both civil and criminal cases.

The United States has always regarded the exercise of extraterritoriality as a necessary evil, and has always been inclined to take a conservative view of the scope of the powers conferred by the grant of extraterritorial privileges. An interesting illustration of both of these statements is found in the negotiation of an extradition treaty with Japan on April 29, 1886, at the very time that negotiations were pending between Japan and the western powers for the relinquishment of extraterritoriality. The United States, through the negotiation of this treaty, at one and the same time conceded, by implication, that the grant of extraterritoriality did not, when properly construed, imply the power to extradite, contrary to the position maintained by England and other countries, and through its willingness to conclude such a treaty, and

the confidence thus manifested in the ability and impartiality of the Japanese courts, it lent its moral support to the Japanese contention that the time had come for the abandonment of extraterritorial privileges in Japan, and contributed materially to the successful conclusion of the negotiations through which extraterritoriality was finally abandoned by all the powers, and Japan placed in all respects upon the footing of a modern civilized power.

The traditional American policy in respect to extraterritoriality is embodied in the treaty provisions with Corea and China (treaty with Corea of May 22, 1888, article 4; treaty with China of October 8, 1903, article 15), in which the United States expressly agrees to relinquish extraterritorial privileges as soon as the judicial administration of these countries shall be so reformed as to warrant such action.

The treaty provisions under which extraterritoriality in China is exercised today are articles 21, 24, 25 and 29 of the treaty of July 3, 1844; article 11 of the treaty of June 18, 1858; and article 11 of the treaty of November 17, 1880. The combined effect of these treaties is to confer complete civil and criminal extraterritoriality upon citizens of the United States residing in China, to be exercised

by the consul or other functionary of the United States thereto authorized.

The exceptions and qualifications to complete extraterritoriality arise only in cases in which citizens of the United States become involved in controversies with citizens of China or of some other foreign power. In the first case the treaties provide that the questions arising

shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction,

while in cases of the latter class custom has long since established the rule that the court of the nation of which the defendant is a subject or citizen shall have jurisdiction.

While it is true that extraterritoriality is an exception to the ordinary principle of international law which asserts the exclusive jurisdiction of every nation within the limits of its own territory and all extraterritorial rights, internationally speaking, must be founded upon treaty provisions, according to the constitution and municipal law of the United States, special statutory authority is necessary in order to provide for the exercise of the powers secured by the treaty except in so far as treaties may be self-operative, in which case they would need no further legislative reinforcement. Congress has made legislative provision for enforcing the extraterritorial rights of the United States upon three

separate occasions; namely, by the act of August 11, 1848, 9 Statutes at Large 276; the act of June 22, 1860, 12 Statutes at Large, p. 72; the act of July 1, 1870, 16 Statutes at Large, p. 183. Minor amendments were also introduced by the act of March 3, 1873, chapter 249, 17 Statutes at Large 582; the act of June 14, 1878, chapter 193, 20 Statutes at Large, 131. These various provisions are consolidated in the Revised Statutes, §§4083-4130. The substance of all this legislation has been summarized in an opinion of Attorney General Cushing of September 19, 1855, and it may be well noted in passing that in the learned and comprehensive opinions of Attorney-General Cushing may be found the clearest and almost the only authoritative discussion of the scope and meaning of American extraterritoriality in the Orient.

In order to execute these treaties—to carry the laws of the United States into Turkey and China—to have our territorial jurisdiction follow our people and our flag into those empires—persons clothed with lawful authority are the necessary instruments. * * *

Accordingly, the statute contains the following important provision:

That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect; but in all cases where such laws are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies, the common law shall be extended in like manner over such citizens and others in China; and if defects still remain to be supplied and neither the common law nor the statutes of the United States furnish appropriate and suitable remedies, the commissioner shall, by degrees and regulations which shall have the force of law, supply such defects and deficiencies."

The system of law is composed, therefore, of:

1. The laws of the United States, comprehending the constitution treaties, acts of congress, equity and admiralty law, and the law of nations, public and private, as administered by the supreme court, and circuit and district courts of the United States, and, in certain cases, regulations of the executive departments.

2. "The common law." In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations of men, such as, within the United States, are of the resort of the courts of the several states.

Some general code in these respects became necessary, because the law of the United States—that is, the federal legislation—does not include these matters, and, of itself, would be of no avail toward determining any of the questions of property, succession, the contract, which constitute the staple matter of ordinary life.

For such of the states as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those states at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent state.

Meantime, in addition to many changes, differing among themselves, which the

common law underwent in each of the colonies before it became a state, that common law has been yet more largely changed by the legislation and judicial construction of each of the states.

Hence, it was not enough to enact that the common law should intervene to supply, in China, deficiencies in the law of the United States. For the question would be sure to arise: What common law? The common law of England at the time when the British colonies were transmuted into independent republican states? Or the common law of Massachusetts? Or that of New York, or Pennsylvania, or Virginia? For all these are distinct, and in many important respects diverse, "common law."

To dispose of this difficulty, the statute went one step further, and enacted, that:

3. "Decrees and regulations" may be made from time to time by the commissioner, which shall have the force of law, and supply any defects or deficiencies in the common law and the laws of the United States.

This power of supplementary decree or regulation serves to provide for many cases of criminality, which neither federal statutes nor the common law would cover.

In addition to which, it is enacted that the commissioner, with advice of the several consuls, shall prescribe the forms of processes to be issued, the mode of executing the same, the form of oaths, the costs and fees to be allowed and paid; and generally to make all such decrees, regulations, and orders, under the act, as the exigency may demand, which shall be "binding and obligatory until annulled or modified by congress." (§5).

In certain respects, therefore, the commissioner *legislates* for citizens of the United States in China, it being required meanwhile, that such "regulations, orders and decrees," as he may make in the premises shall be transmitted "to the President, to be laid before congress for its revision" (§6). 7 Opinions of the Attorney-General, p. 495 at 502-505.

According to the statutes, as they exist at present, the power to make regulations, vested in Cushing's time in the American commissioner, is entrusted to the United States minister. The liberal construction given by Attorney-General Cushing to this power to make decrees and regulations has since been questioned. In an instruction of Secretary Fish to Mr. Bingham, dated January 20, 1876, it is denied that the provisions of the statute confer upon the minister any power of general legislation as the words are commonly understood, and it is said that they simply confer the power to supply any defects in the mode of exercising the jurisdiction which the statutes and treaties give to the consular courts. This would appear to confine the activities of the minister to the regulation of remedies and to forbid him to enter upon the definition of rights. This view has apparently been adopted by the department of state and is expressed in §627 of the consular regulations. No authoritative definition of the power to make decrees and regulations appears to have been given, although the question is one of great importance even at the present time.

It has long been recognized that the federal legislation regulating the

exercise of extraterritorial powers was wholly insufficient, whether judged by comparison with the regulations adopted by other nations or with the needs of American citizens in extraterritorial countries as developed in actual practice, and it has been freely admitted by those best acquainted with conditions in the Orient that if our administration of extraterritorial authority in general and especially in China has operated with reasonable satisfaction it has been due entirely to the good sense of those charged with its administration and not at all to the wisdom or completeness of statutory regulations provided by congress. (See letter of Secretary Frelinghuysen, *supra*.)

Several efforts have been made to remedy these conditions. In 1881 the American residents in Japan memorialized congress, praying for legislation modifying the antiquated rules of the common law imposed by the provisions of the statute upon Americans in extraterritorial jurisdiction. The memorialists said in part:

For us there is no statute of frauds; there is no insolvency legislation * * * imprisonment for debt has not been abolished; the disabilities of women at the common law have remained unaltered; we have no statute of limitations and none providing for conditional bills of sale or chattel mortgages. In many other respects investigation will show how unfavorable is the legal status of a citizen of the United States residing here. (Senate Miscellaneous Documents, 70, vol. i, 47th Congress 1st Session.

In 1882 an effort was made to secure legislation and an elaborate bill was presented to congress, providing for the establishment of a regular judicial system in China. (See letter of Secretary Frelinghuysen to the Hon. William Windom, *supra*.) The bill, however, failed to become a law and the old conditions were suffered to continue.

It was to relieve this situation that the recent act of congress of June 30, 1906, was enacted. (An act creating a United States court for China and prescribing the jurisdiction thereof. U. S. Statutes at Large, 1905-1906, p. 814.)

The first section of the act provides for the establishment of a United States court for China, having jurisdiction in all cases in which jurisdiction may now be exercised

by United States consuls and ministers, by law and by virtue of treaties between the United States and China,

except in so far as the jurisdiction of the consular courts is preserved in the second section of the act.

Section 2 retains

the jurisdiction of the consular courts in civil cases where the value of the property involved * * * does not exceed \$500 * * * and in criminal cases where the

punishment for the offense charged cannot exceed by law \$100 fine or sixty days imprisonment or both.

An appeal is granted from all final judgments of the consular courts to the United States court for China. Supervisory control is conferred upon the United States court

over the discharge by consuls and vice consuls of the duties prescribed by the law of the United States relating to the estates of decedents in China.

Section 3 provides for appeals from all final judgments of the United States court for China to the United States circuit court of appeals of the ninth judicial circuit, and thence in proper cases to the supreme court of the United States.

Section 4 once more provides that the jurisdiction of the court shall be exercised in conformity with treaties and laws of the United States,

but in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same, subject to the terms of any treaties between the United States and China.

Section 5 prescribes the procedure of the court in accordance with existing procedure in the consular courts in China

in accordance with the Revised Statutes of the United States; provided, however, that the judge of the said United States court for China shall have authority from time to time to modify and supplement such rules of procedure.

The remaining sections of the act provide for the officers of the court, a judge, district attorney, marshal and clerk, and regulates the practical details of instalation. It is understood that the act was drawn in brief and general terms in order that the court might be left free to adapt itself to the needs of a situation little understood in the United States, with the idea that further legislation may be enacted by way of amendment and supplement as needs shall develop in the course of the practical operation of the act.

The Hon. Lebbeus R. Wilfley, of Missouri, was appointed the first judge of the United States court. Judge Wilfley leaves behind him in the Philippines, where he served as attorney general, a record of accomplishment. Frank E. Hinckley, author of a convenient and valuable monograph on American consular jurisdiction in the Orient, has been appointed clerk of the court, while Arthur Bassett of Missouri who had served with credit as assistant to Judge Wilfley in the Philippines was selected as district attorney, and Hubert O'Brien, a lawyer of Detroit,

Mich., highly recommended by members of his profession, has been appointed marshal of the court. Concerning the personnel of the court, it is, without in any wise intending to reflect upon many capable and conscientious men who have served this government in consular and diplomatic positions in the East, perhaps not improper to quote from a private letter recently received by a leading newspaper editor from a prominent American business man at Shanghai, in which it was said that the members of the court

represented a new type of American officials in China.

Judge Wilfley opened court on December 17, 1906. His first order provided that all American attorneys who wished to be placed on the roll of attorneys for the court should first qualify by an examination and the presentation of satisfactory proofs of a good moral character. Eight applicants presented themselves for an examination and only two qualified. As a result of this purging, the American bar of the United States court for Shanghai consists of the United States district attorney, who presumably was not called upon to pass an examination, and Messrs. Fessenden and Jernygan of the firm of Jernygan and Fessenden. A monopoly in restraint of trade in violation of the fundamental principles of the common law has however, been avoided by the admission of duly certified members of the bar of consular courts of the various other nationalities on the principle of comity.

This action of the court aroused much criticism which has been to some extent reflected in the United States. As to the inherent power of the court to determine the qualifications necessary in a member of the bar by means of an examination there would seem to be no question. (Ex parte Garland 4, Wall 333 at 378; ex parte Secunbe 19 How 9 at 13.) As to the expediency of the somewhat drastic exercise of the power in the particular instance, opinions of men equally qualified to judge might well differ, and any opinion expressed at this distance would be necessarily uninformed. It can only be said that the learned judge has certainly failed to realize the hope humorously expressed by an English common law judge suddenly called upon to sit in the admiralty division, who opened court by remarking

And may there be no moaning of the bar when I put out to sea.

If the action of the court in regard to the qualifications of attorneys aroused the opposition of an important and vociferous profession and its friends, another policy initiated by the court and district attorney rallied to the support of the court all the best elements of the American

community. In the past the houses of prostitution conducted under American auspices have disgraced our country in the eyes of both European and Chinese and made the words "American girl" a by-word and reproach in all China. So bold and shameless had the proprietors of these establishments become that they actually had the effrontery to issue on special occasions invitations decorated with American flags. Informations were presented by the district attorney against all of the keepers of houses of ill-fame in Shanghai who claimed American nationality. The informations proceeded on the theory that the common law regards the prosecution of such a calling as a misdemeanor. Eight were arrested and brought into court. They were held under bond of \$2000 and were only permitted to leave court in the company of the marshal to secure bail. On the hearing, four immediately pleaded guilty. The other four entered pleas in bar on the ground of citizenship. Two of them claimed to be Spaniards and presented registration certificates from the Spanish consul; one claimed to be a German and the other asserted English nationality. The court held that in the matter of proving citizenship the certificate of a consul was not conclusive but would be considered along with other evidence. As a result the Spanish certificates were immediately withdrawn and the holders admitted the jurisdiction of the court and pleaded guilty. The court later over-ruled the plea of the defendant who claimed British citizenship and she pleaded guilty. In view of a promise on the part of all the defendants to adjust their affairs and leave China, the court let them off with a fine of \$1000, Mexican, apiece. The one remaining case appears to be still under advisement, but if the defendant is released, the Shanghai public will understand that she is not an "American girl."

Another case interesting in its facts as throwing light upon the new and strange conditions to which the principles of Anglo-Saxon jurisprudence are being applied was a case in which a Chinese firm brought an action for deceit against an American who had leased to the plaintiffs certain grandstand privileges, including the right to conduct Chinese gambling games during the autumn race meets, this upon the distinct understanding that Chinese gambling was to be permitted by the authorities. On the face of this understanding, as the plaintiffs alleged, the defendants took their money which they now refused to return, although, at the time of taking the same, said defendants well knew that Chinese gambling would not be permitted upon the premises. Here arises an interesting situation. We can well imagine a court in this country struggling with the doctrine of *pari delicto* and perhaps permitting the defendant to escape. Not so the United States court for

China. The principle of the square deal was vindicated by a decision which mulcted the defendant in damages while the district attorney was directed to institute criminal proceedings.

But the court has not been entirely engaged in qualifying its bar (purifying society). A number of civil and criminal cases of a general nature have been discussed by the court during its first term, involving questions of law both interesting and important. One defendant was prosecuted for obtaining money under false pretences. The charge was brought under the statute of 30 George II. and a motion to quash was made on the ground that the information did not charge a crime under the common law. This raised the difficult question of the construction of the term "common law" as used in the statute creating the court. The court appears to have taken the position that the term "common law" was to be construed to include those laws which would have been in force in the colonies after the change of sovereignty without further legislation, or in other words all the laws of England, written or unwritten, which were applicable to the colonies at the time of the declaration of independence. The opportunity to test this construction through an appeal to the United States court of appeals for the ninth judicial district was lost by the escape from Shanghai of the accused before he was sentenced.

In the next case which came before the court, the judge took precaution against the escape of the defendant. After the conviction and sentence of the accused, the court exercised the authority conferred by §5 of the act creating the court and modified rule 66 in force in the consular court as regards bail after conviction, providing that after conviction and appeal, bail should be allowed or denied in the discretion of the judge. The court then denied bail to the defendant on the ground that it appeared to him that the appeal was frivolous. *Habeas corpus* proceedings were begun on behalf of the defendant and it is reported in the press that he has been released on appeal to the United States court of appeals for the ninth judicial district. The grounds on which the court acted are not known.

These two cases have served to develop two questions which will doubtless provide ample opportunity for argument before the new court, namely the scope of the words "common law," and the nature of the power originally vested in the United States minister to make rules and regulations to supply the defects of the common law and the power now vested in the court to modify such rules so far as they relate to procedure.

At a banquet of the American Association at Shanghai, Judge Wilfey, as reported in the *Celestial Empire* of December 22, 1906, in responding

to the toast, "The Judicial Department," defined the requisition of a typical American court as

First, honesty; second, courage; third, good sense, and fourth, a knowledge of the law.

All in all the new court seems to have grappled with energy the perplexing situation before it, and we may look forward to some new developments of the common law in this new field for American jurisprudence which will not only make for the betterment of conditions in China but throw some interesting light upon old legal problems in a new environment.

ANGLO-AMERICAN RELATIONS

The year 1907 opened without any friction between Great Britain and the United States and it is to be hoped that the year will close without any. It is a pleasure to be able to state that the *modus vivendi*, safeguarding the American fishing rights within the Newfoundland waters, accomplished the purpose which the contracting countries had in mind. The rights of both parties were clearly set forth in advance of the fishing season, the imperial authorities had seen to it that these rights were in no instances violated by local ordinance or action, with the result that the fishing season of 1906-1907 closed without any untoward incident. If the *modus vivendi* (the text of which was in the Supplement to the January number, pp. 22-31) should be continued or if a permanent arrangement could be reached or if a treaty or convention could be negotiated which would clearly define and adequately protect the rights of American fishermen, a recurrent cause of friction would be removed.

For one brief moment an incident occurred at Jamaica which might have caused an unpleasant feeling if there had been any source of irritation existing between the two countries. The lamentable earthquake which destroyed Kingston and caused the death of many an inhabitant seemed to furnish opportunity to the jingo on both sides of the water to resort to favorite, but fortunately forgotten, methods. The landing of Admiral Davis at the request of subordinate authorities for protection of life, liberty and property did not meet with favor from the governor, and a thoughtless phrase written by the governor in a moment of excitement might have caused infinite trouble if it had not been disavowed by the English press and had it not been charitably received in this country. If Admiral Davis had landed without the consent of the local authorities he would have been guilty of a technical violation of

British sovereignty, but the owner of a house is not overmindful who enters it to put out a fire. An action of trespass under such circumstances is unknown, and the technical violation of sovereignty, had it occurred, would not have been the source of criticism by the right-minded. It is a fact, however, that Admiral Davis landed his men at the request of the local officials and therefore a human action does not have to defend itself.

The following colloquy occurred in parliament:

Mr. Collings asked the under-secretary for the colonies if it were in accordance with international law and international etiquette for the admiral of a foreign ship to land an armed force in a British colony without the permission of the governor of that colony.

Sir E. Grey [secretary of state for foreign affairs], who replied, said: The answer is in the negative, and I may add that in the incident to which the right honorable gentleman has previously referred no such right was ever claimed. [Ministerial cheers.]

Mr. Collings: Was the right, or supposed right, exercised?

Sir E. Grey: No, sir; if a right is not claimed you cannot say it has been exercised. What I am convinced of is that there was naturally in the presence of such a catastrophe a certain amount of misunderstanding. The action of the American admiral was inspired by the single-minded motive of humanity and the desire to remove suffering. [Cheers.] Any other construction placed upon his actions would be both unworthy and untrue. [Cheers.]

Mr. Collings: Does not the fact remain that in opposition to the governor of a British colony this armed force was landed, and that there was no disorder that would warrant any such action? [Opposition cheers.]

Sir E. Grey: No, sir. According to my information the question of the right honorable gentleman contains a statement of fact which is not borne out by the true accounts of the occurrence. [Ministerial cheers.]

Mr. Collings asked Mr. Churchill when the papers referring to matters connected with the Jamaica earthquake and to Sir Alexander Swettenham's resignation would be issued.

Mr. Churchill [under secretary of state for the colonies]: The colonial secretary is in communication with the foreign secretary, and the question of publication is receiving consideration. I cannot say more at the moment as to whether any papers will be issued, and, if any are issued, what they will be.

Mr. Collings: Has the honorable gentleman not already made a promise that such papers should be issued?

Mr. Churchill: I am certainly not aware of any such promise as that suggested. The only statement that has been made is that we would consider whether papers should be laid and what papers. That process is still going on. [Laughter.]

The episode is mentioned here in no unkindly spirit. The burst of good feeling on both sides of the water makes one almost glad that the incident happened.

The appointment of the Right Honorable James Bryce as ambassa-

dor to the United States has been received on all sides as the most pleasing and tangible exhibition of good feeling on the part of Great Britain. No choice could have been more happy, for if an ambassador's chief function is to interpret the people by whom he is sent to the people to whom he is accredited, nobody could more fully perform this mission than one who has interpreted our institutions not only to Great Britain but to the Americans themselves. We feel, not unnaturally, that Mr. Bryce understands us, and understanding us we feel that we will have no difficulty in understanding him. The American Commonwealth is a standard and household work, and we look upon Mr. James Bryce as a sincere and sympathetic friend of our country and its institutions. It is in no unkind or critical spirit that we say that Great Britain was never so adequately represented in the United States as it is at present in the person of this simple and high-minded Scotchman. It is natural that we take an abnormal interest in British affairs for we are, to use the happy expression of the late John Richard Green, "two nations but one people." The coming of Mr. Bryce to interpret to us the old world is therefore no ordinary event. In expressing pleasure at the coming of Mr. Bryce no criticism of any other country or its representative is intended: it is simply a recognition of the apt phrase of Plautus, "*Tunica propior pallio est*," "My shirt is nearer to me than my coat." A more elegant version would be "blood is thicker than water." In any case we bid Mr. Bryce welcome and wish him success.

ANGLO-FRENCH CONVENTION RESPECTING THE NEW HEBRIDES

When the Anglo-French agreement of April 8, 1904, was signed, it was impossible for the two contracting governments to reach an accord with respect to the New Hebrides, and it was stipulated simply that

the two governments agree to draw up in concert an arrangement which, without involving any modification of the political *status quo*, shall put an end to the difficulties arising from the absence of jurisdiction over the natives of the New Hebrides.

The question of the New Hebrides is one of long standing. The people of Australia feared in 1877 that France intended to occupy the islands as a penal colony, and in 1878 France disavowed any designs upon their independence. French influence was steadily augmented, however, and it was thought that Great Britain would withdraw its objection to French control of the islands if it were agreed not to use them as a penal colony. But no change took place in the political status of the territory. In 1886 a military force was sent to the islands to protect French colo-

nists, and in 1887 an Anglo-French convention established a mixed naval commission for the maintenance of order and the protection of French and British citizens in the New Hebrides. This commission had too little power to maintain order. British orders in council of 1877, 1879 and 1880 created the office of high commissioner for the western Pacific, and the title of high commissioner was conferred upon the governor of the Fiji Islands. From 1888 to 1890 a British agent, with the title of consul, was stationed in the New Hebrides. Under the Pacific orders in council of March 15, 1893, the British high commissioner was given jurisdiction with respect to British subjects in Pacific islands having no organized government; ample protection was thus extended to British subjects in the New Hebrides.

After the convention of 1887, France took no further steps for the protection of French subjects in the New Hebrides, until 1900. By a French law of July 30, 1900, the president of the republic was authorized to take measures to secure the protection of French citizens settled in the islands of the Pacific Ocean which did not form a part of French territory, and in execution of this law a decree of February 28, 1901, appointed the governor of New Caledonia commissioner general of the French Republic in the Pacific Ocean. The French commissioner general was given powers similar to those exercised by the British high commissioner.

After the action of France there were in the New Hebrides four distinct authorities: (1) The native authorities. (2) The mixed naval commission created by the convention of November 16, 1887. (3) The agents of the British high commissioner. (4) The agents of the French commissioner general. There were no authorities which properly had jurisdiction over other than natives and British and French subjects. This situation has been altered by the terms of the Anglo French convention, signed at London on October 20, 1906.¹

THE ABOLITION OF "PRIZE MONEY"

In the American Law Register for September, 1906, Mr. Charles Chauncey Binney calls attention to the present law of the United States with reference to "prize money." Inasmuch as the protection of private property at sea in time of war is one of present interest, we give below the text of the law:

¹ See text of convention in the Supplement. For a careful discussion of the question of the New Hebrides, see an article by Professor N. Politis in *Revue Générale de droit international public*, 8:121, 2,30.

All provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed. (March 3, 1899. 30 Stat. L. 1007.)

This enactment marks an important step toward greater security of private property in time of war, for it takes away the pecuniary inducements for the capture of such property. The institution of "prize money" is still in existence outside of the United States, and its abolition would be a proper subject for consideration at the coming Hague conference.

Many people advocate the complete immunity from capture of non-offending enemy property upon the high seas and consider its capture as unjustifiable, as the seizure of such property would be if on land. This may be so, but it is important to consider whether freedom from capture of property on sea would remove a check upon war by freeing large and important commercial interests from danger. The question is one of fact not of theory.

The abolition of privateering has freed commerce from a band of irresponsible adventurers; the abolition of prize-money removes an incentive to prey unjustly and for personal profit upon private property.

It may be said that one class of property should not suffer solely by reason of its situation while property of the same kind would be immune on land. This is unfortunate but if capture of property so circumstanced serves to prevent war by weighing the purse against the sword, it is better that property afloat be subject to loss rather than that a human life be endangered. Certain classes of the community do not suffer in their persons by war, while the soldier and sailor meet death. Why should not property be exposed to danger? The question is, as suggested, one of fact not of theory.

ANGLO-FRENCH-ITALIAN AGREEMENT REGARDING ABYSSINIA

After prolonged negotiations, France, Great Britain and Italy signed, on December 13, 1906, a treaty regulating their respective rights in Abyssinia. The treaty guarantees the integrity of Abyssinia, and the maintenance of the *status quo*. In case future events should make impossible the maintenance of the *status quo* the three signatory powers agree to act only in concert. Great Britain obtains the assurance that nothing will be done to modify the course of the Nile and its tributaries; Italy is given a free hand to construct railways from Eritrea to Addis-Abeba, and from there to its colony of Benadir; to France is assured

control of the proposed and partially constructed railway from Jibouti to Addis-Abeba, though the directorate of this railroad shall have one member each from Great Britain, Abyssinia and Italy. The Emperor Menelik has expressed his satisfaction with the terms of the treaty.

THE JORIS CASE AND THE TURKISH CAPITULATIONS

On the twenty-first of July, 1905, an unsuccessful attempt was made upon the life of the Sultan at Constantinople. Among the persons arrested for this offense was Charles Edouard Joris, a Belgian subject. Joris avowed his connection with the crime, and was condemned to death by the criminal court of Constantinople; this sentence was affirmed by the criminal section of the Turkish court of cassation. Joris was assisted at the trial before the criminal court by a representative of the Belgian legation, who refused to join in the judgment of the court. After judgment the Belgian legation demanded that Joris be handed over to the Belgian government for trial before the court of assize of Brabant, which has jurisdiction, under Belgian law, "over crimes committed by Belgians in non-Christian countries." The Turkish government refused to comply with this demand, and has maintained its attitude, notwithstanding the repetition of the Belgian demand. The question at issue turns largely upon the interpretation of the Turco-Belgian treaty of August 3, 1858. The French text of this treaty supports the Belgian contention; the language of the Turkish text provides only that a Belgian diplomatic or consular officer shall assist at the trial. Prof. N. Politis, in a recent number of the *Revue de droit international privé* (2:659) criticizes the Belgian position, and asserts that neither treaties nor usage justify the denial of the jurisdiction of the Turkish courts.

RESOLUTIONS ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW, AT GHENT, IN SEPTEMBER, 1906

1. It is conformable to the exigencies of international law, to the loyalty which nations owe to each other in their mutual relations as well as to common interest of all states, that hostilities should not commence without previous and unequivocal notice.
2. Such notice may take the form of a declaration of war pure and simple, or that of an official ultimatum by the state desirous of beginning war.
3. Hostilities should commence only after the expiration of such a period of time that the rule of previous notice shall not be considered to have been eluded.

Whether the adoption of these rules is desirable or not is a serious question. The practice of nations is to attack and to declare later if

necessary. The attack is, in itself, a sufficient declaration. It may be better form to tell a scoundrel that you intend to horsewhip him on such and such a day if he is found at large, and it may be more polite to inform a person that you intend to knock him down before doing so. But the question is one of form rather than substance. Why should people resort to force; why should they not settle their difficulties in law courts of justice? And why should nations which, after all, are merely aggregations of men and women, not resort to courts of arbitration instead of killing and bruising like people bereft of reason? The answer seems to be that nations are not reasonable beings.

It is maintained with some confidence that belligerents have no cause of complaint because they are rapped over the knuckles somewhat sooner than expected; but neutrals have a right to know when they, their citizens and their commerce are to be subjected to the burdens imposed upon neutrals during war. In the interest of neutrals a declaration of war seems highly desirable.

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

In the Editorial Comment of the January number (p. 134) the first annual meeting of the American Society of International Law was announced for the nineteenth and twentieth of April.

The following careful and it is hoped satisfactory program has been prepared for a session of two days.

Friday Morning at 10 o'clock.

Address of Welcome.

General Business.

Address by the President of the Society.

Papers and discussion on:

1. Would immunity from capture during war of non-offending private property upon the high seas be in the interest of civilization?
2. Is the trade in contraband of war unneutral and should it be prohibited international and municipal law?

Friday Afternoon at 2:30 o'clock.

Continuation of unfinished business.

Papers and discussion on:

1. Transference from municipal courts to an international court of all prize cases.
2. Is the forcible collection of contract debts in the interest of international justice and peace?

Friday Evening at 8 o'clock.

Continuation of unfinished business.

Papers and discussion on:

The rights of foreigners in the United States in case of conflict between federal treaties and state laws.

Saturday Morning at 10 o'clock.

Papers and discussion on:

The second Hague conference and the development of international law as a science.

Saturday Afternoon at 2 o'clock.

The President of the United States will Receive the Members of the Society at the White House.

Saturday Evening at 7 o'clock.

Banquet at the New Willard Hotel.

An account of the meeting will be given in the July number.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. Sc. Pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mem. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipsig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, rivista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, *Staatsblad*, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stats. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

April, 1906.

- 14 ITALY—SALVADOR. Treaty of friendship, commerce and navigation, signed at Guatemala. *Diario Oficial*, November 9.

May, 1906.

- 22 BELGIUM—LUXEMBURG. Convention signed at Brussels, additional to convention signed April 15, 1905. Workmen's accidents. Belgian law approving, December 30. Ratifications exchanged at Brussels, January 14, 1907. *Monit.* January 21-22; *B. Usuel*, December 30. See *February 21, 1906*. *B. de l'office du travail*, July, 1906, p. 714 *et seq.*, for history of such arrangements.

June, 1906.

- 5 BELGIUM—ROUMANIA. Commercial convention signed at Bucharest *Annales dipl. et cons.* 5:30; *B. Usuel*, December 21; *Monit.* January 14, 15. Replaces the convention signed January 10-22, 1894 (*State Papers* 86:1019); takes effect the tenth day after exchange of ratifications; term, four years and one year after denouncement.

ART. IV. It is understood that the most favored nation clause stipulated by this convention places no obstacle to advantages resulting from a customs union concluded or to be concluded by either of the high contracting powers, and that it does not exclude collection of additional duties on imports that obtain bounties for export or production.

June, 1906.

Ratified by Roumania, December 30, 1906/January 12, 1907; ratified by Belgium, December 21, 1906; ratifications exchanged at Bucharest, January 12.

- 12 NORWAY. Law relating to the diplomatic and consular services. General consular instructions for the consuls of Norway under this law were promulgated July 24, 1906.

July, 1906.

- 6 COLOMBIA—PERU. Provisional *modus vivendi* respecting Putumayo signed at Lima.
- 13 FRANCE—PORTUGAL. Exchange of notes respecting reciprocal protection of trade-marks in China. *J. dr. int. privé*, 34:245. See China trade-mark regulations, *North China Herald*, February 15, 1907.
- 19 FRANCE—GREAT BRITAIN. Agreement relative to the boundary between the Gold Coast and the French Sudan. *Treaty ser.* 1907, No. 8.
- 19 PERU. Decree approving convention signed at Rome, June 7, 1905, for the creation of a permanent international institute of agriculture.
- 24 PARAGUAY—PERU. Treaty of friendship and arbitration signed at La Paz. *B. Min. Rel. Ext.*, Lima, Year 3, No. 15.

August, 1906.

- 13 PERU. Repeal of article 13 of law of October 23, 1888, respecting extradition.
- 29 BELGIUM—ITALY. Declaration signed at Brussels concerning gauging of merchant vessels. Promulgated by king of Italy, November 15, 1906. *Ga. Ufficiale*, December 27: *B. Min. Aff. Est.*, December. The new declaration, a substitute for that of October 13, 1899, is based on the Italian regulation of December 21, 1905, which is substantially the same as the Belgian regulation of 1897. *R. di dr. int.* 1:565.

September, 1906.

- 17 ARGENTINA—SPAIN. Ratifications exchanged at Buenos Aires of convention signed at Buenos Aires, September 17, 1902. Letters rogatory. *Ga. de Madrid*, January 3, 1907.
- 19 CANAL ZONE. Executive order. Extradition of criminals from Canal Zone to Panama. Under article 16 of treaty between Panama and United States signed at Washington November 18, 1903. *Ga. Oficial*, Panama, January 7, 1907.

September, 1906.

- 26 ECUADOR. Ratification of international agricultural institute convention signed at Rome, June 7, 1905. Ecuador becomes a member of the fifth class mentioned in article 10. *B. A. R.* December. See *August 16*.

- 28 ITALY—NICARAGUA. Ratifications exchanged at Paris of treaty of friendship, commerce and navigation signed at Managua, January 25, 1906. Promulgated by Italy, October 21, 1906. *Ga. Ufficiale*, November 16, 1906; *B. Min. Aff. Est.*, November. Contains reciprocal most favored nation treatment, that is not however applicable to privileges accorded or to be accorded by Nicaragua to other Central American Republics. *B. A. R.* January. For a comparative examination of this treaty and those of Italy with Paraguay (August 22, 1893) and Salvador (April 14, 1906) see *R. di dr. int.* (Rome) 1:608 *et seq.*

October, 1906.

- 12 AUSTRALIA. Customs tariff (British preference) act reserved by governor general for the significance of his majesty's pleasure, on the grounds that its provisions might be inconsistent with treaty obligations. *G. B. Cd.* 3339. The question of treaty obligations as affecting the dependencies of the empire is among the subjects proposed for discussion at the colonial conference to be held at London, April 15, 1907. *G. B. Cd.*, 3337, 3340; *Drage: The colonial conference, Fortnightly R.* April, 1907; *Milmer: Some reflections on the coming conference, National R.*, April.
- 18-20 BRAZIL—ITALY. Exchange of notes at Rio de Janeiro maintaining in force until December 31, 1908, the provisional commercial agreement resulting from the notes exchanged on July 5, 1900. Italian products entering Brazil continue to enjoy the rates of the minimum tariff so long as the import duties applicable in Italy to coffee originating from Brazil shall not exceed 130 francs per 100 kilograms. *Diario Oficial*, October 23, 1906; *R. di dr. int.* 1:567; *Ga. Ufficiale*, November 7, 1906.
- 19 FRANCE—GREAT BRITAIN. Agreement relative to the frontier between the British and French possessions from the Gulf of Guinea to the Niger. *Treaty ser.* 1907, No. 5.
- 20 BELGIUM—SWEDEN. Denouncement by Sweden of the convention signed July 21/August 2, 1838. Succession to property. Takes

October, 1906.

effect April 1, 1907. *Monit.* October 31; *B. Usuel.* October 20.
See *December 29.*

- 21 GREAT BRITAIN—ITALY. Declaration extending to the new African colonies of Great Britain the provisions of the commercial treaty signed June 15, 1883. *R. di dr. int.* 1:566.
- 29 GERMANY—NETHERLANDS. Ratifications exchanged at The Hague of treaty signed at The Hague, December 17, 1904. Also an agreement on the execution thereof signed October 29. Proclaimed by Germany, December 6. *Reichs-G.* 1906, No. 51, Proclaimed in Netherlands, November 7, 1906. *Staatsb.* 1906. No. 279. See *January 13, 1906.*

November, 1906.

- 3 ITALY—NETHERLANDS. Exchange of notes modifying agreement of June, 1891. Communication of data of census relative to their respective subjects. *R. di dr. int.* 1:567.
- 5 SALVADOR. Decree of president adhering to Pan-American sanitary convention of October 14, 1905. *B. A. R.* January, 1907. See *May 29, 1906.*
- 5 SALVADOR. President approved and submitted to ratification of legislative assembly the convention or the establishment of an international institute of agriculture signed at Rome, June 7, 1905. *B. A. R.* January, 1907. See *August 16, 1906.*
- 7 GREAT BRITAIN—SURINAM. Postal money-order agreement signed at Paramaribo; signed at London, April 29, 1906; taking effect January 1, 1907. *Cd.* 3354.
- 29 GREAT BRITAIN. Marriage with foreigners act (6 Edw. 7, ch. 40). Enables British subjects to obtain the certificates, prerequisite in some countries to the validity of marriage there with a subject thereof, and provides means for requiring foreigner marrying British subject in the United Kingdom to produce a similar certificate that the intended marriage will be valid in his country. Arrangements with foreign states for issue of such certificates are in project. On defects in former law see *Ogden v. Ogden* alias *Philip* (December 10, 1906) 22 *T. L. R.* 158; *Juridical R.* 18:408.
- 29 INTERNATIONAL. Arrangement respecting the unification of the pharmacopœial formulas of potent drugs signed at Brussels, between Germany, Austria, Hungary, Belgium, Bulgaria, Denmark, Spain, United States, France, Great Britain, Greece, Italy,

November, 1906.

Luxemburg, Norway, Netherlands, Portugal, Russia, Servia, Sweden and Switzerland. *Monit.* December 30-31; *B. Usuel*, November 29; *Treaty ser.* 1907, No. 10.

- 30 GREAT BRITAIN—PERU. Ratifications exchanged at Lima of treaty of extradition signed at Lima, January 26, 1904. "Each of the High Contracting Parties reserves the right to grant or refuse the surrender of its own subjects or citizens." *B. Min. Rel. Ext.*, Lima, Year 3, No. 15.

December, 1906.

- 4 COSTA RICA. Ratified Central American bureau convention. See *September 15*.
- 4 MEXICO—SALVADOR. Parcels-post convention signed at San Salvador; signed at Mexico, October 12.
- 7 COSTA RICA. Ratified Pedagogical Institute convention. See *September 15*.
- 10 GREAT BRITAIN—HONDURAS. Postal money-order agreement signed at Tegucigalpa; signed at London, October 12; took effect February 1, 1907. *Cd.* 3355.
- 11 FRANCE—ITALY. Ratifications exchanged at Paris of arrangement signed at Paris, January 20, 1906. Transfer of funds between Italian and French savings banks. French law authorizing ratification, August 3. Promulgation by president of France, December 28. *J. O.* August 8, p. 5645; *id.* January 4, p. 69; *Arch. dipl.* 97:147.
- 21 FRANCE—NORWAY. Declaration signed at Christiania, to take effect, January 1, 1907. Reciprocal communication of births, marriages and deaths of citizens of each state in the domain of the other. French decree proclaiming, January 13, 1907. *J. O.*, January 16, p. 334; *Annales dipl. et cons.* 5:21.
- 24 HONDURAS—NICARAGUA. Arbitral decision of king of Spain on boundary question. The dividing line is traced from Portillo de Teotecacinte to the confluence of the Guineo and Poteca rivers, thence along the Segovia to the Atlantic. *Mensaje dirigido al Congreso Nacional per el presidente*, January 1907; *Memoria rel. ext.* (Tegucigalpa), January, 1907; *Ga. de Madrid*, December 25.
- 26 BULGARIA—FRANCE. Ratifications exchanged at Sofia of treaty of commerce and navigation signed at Sofia, January 13, 1906.

December, 1906.

J. O., January 19, 1907, p. 409; *id.* January 20, p. 450. See *January 13, 1906.*

- 26 COSTA RICA. Ratified general treaty of peace and friendship signed at San Jose, September 25, 1906. See *September 15.*
- 29 BELGIUM—NORWAY. Denouncement by Norway of the convention signed July 21/August 2, 1838. *State Papers*, 27:1014. Succession to property. Takes effect April 1, 1907. *Monit.*, January 9; *B. Usuel*, December 29. See *October 20.*
- 29 FRANCE. Decree restricting title of ambassador to those actually representing the Republic of France in a foreign state. The honorary title cannot be conferred. *J. O.*, January 1, p. 3; *Mem. dipl.*, January 6. The title has for some years been conferred upon ministers plenipotentiary who, especially at retirement, were judged worthy of particular distinction.
- 31 NETHERLANDS. Ratification of protocol signed at Paris, May 18, 1904, respecting suppression of white slave traffic. *Mem. dipl.*, January 6; *Staatsb.* 1906, No. 369. Ratification deposited at Paris, January 14. *Monit.*, January 31.
- 31 NETHERLANDS. Ratification of international sanitary convention signed at Paris, December 3, 1903. *Staatsb.* 1906. No. 370.
- 31/January 2, 1907. BRAZIL—PERU. Exchange of notes extending for one year from January 15, 1907, the existence of the arbitral tribunal under the treaty signed at Rio de Janeiro, July 12, 1904. This tribunal commenced proceedings January 15, 1906, at Rio de Janeiro to adjudicate claims suffered on the upper Juruá and upper Purús in 1902. For the treaty and list of claims before the tribunal, see *B. Min. Rel Ext.*, Lima, Year 3, No. 15; *For. rel.* 1904, p. 111.

January, 1907.

- 1 INTERNATIONAL. Donation of \$750,000 by Andrew Carnegie for the erection of a new building for the use of the Bureau of American Republics. *B. A. R.* January and February. At a special meeting held January 30, the governing board of the Bureau of American Republics passed resolutions of acceptance.
- 2 FRANCE. Act concerning public worship modifying law of December 19, 1905. *J O.*, January 3, p. 34; *B. de statistique*, 31:5; *R. du dr. public*, 24:102. See *January 6, 1907.*
- 2 UNITED STATES. First term of the United States court for China begins, at Shanghai. *North China Herald*, 81:676. See *June 30, 1906.*

January, 1907.

- 3 FRANCE—GREAT BRITAIN. Dedication of the site of Franco-English exposition to be opened at London (Shepherd's-bush) in May, 1908. *Mem. dipl.*, January 6; *Times*, January 4 and 21.
- 5 BULGARIA—FRANCE. Convention signed at Sofia for the reciprocal protection of trade-marks. French law authorizing ratification, March 29, 1907. *J. O.* March 31, p. 2545; *Mem. dipl.* March 31.
- 6 FRANCE. Third encyclical of Pius X. on the separation of church and state. *Times*, January 12; *R. de deux mondes*, 37:468, 480; *Spectator*, January 19; *Sauvage: The religious situation in France*, *Catholic University B.* 13:5; *Olivi: De las relaciones entre la Iglesia y Francia en el tiempo actual*, *R. de dr. int. y pol. ext.*, 2:48. For text, *Mem. dipl.* January 13 and 20. See February 11, 1906.
- 7 BRAZIL. Decree relating to expulsion of foreigners. *B. A. R.*, February.
- 7 PERU—SPAIN. Ratifications exchanged at Madrid of convention signed at Lima, April 9, 1904. *Ga. de Madrid*, January 20. Ratified by congress of Peru, December 29, 1905; proclaimed by president of Peru, January 15, 1906. *B. Min. Rel. Ext.*, Lima, Year 3, No. 9. Liberal professions.
- 8 PERSIA. Death of Shah, Muzaffar-ed-dîn. Born March 25, 1853; succeeded his father Nâsr-ed-dîn, May 1, 1896. Succeeded by his son Mohammed Ali Mirza, born 1872, crowned January 19. *Times*, January 10 and 21; *R. de deux mondes*, 37:478; *Mem. dipl.*, January 27. Idhem-ab Fâni: His Imperial Majesty the late Shah of Persia, *Imp. As. Q. R.* 23:225.
- 9 INTERNATIONAL ECONOMIC CONGRESS opened at London. *Times*, January 10.
- 9 PHILIPPINE ISLANDS. An act to provide for the holding of elections in the Philippine Islands, for the organization of the Philippine assembly and for other purposes. *Official Gazette*, Manila, February 13. The first elections for members of the assembly, eighty-one in number, are set for July 30, 1907.

Sec. 13. *Qualifications of voters.*—Every male person twenty-three years of age or over who has had a legal residence for a period of six months immediately preceding the election in the municipality in which he exercises the suffrage, and who is not a citizen or subject of any foreign power, and who is comprised within one of the following three classes:

(a) Those who, prior to the thirteenth of August, eighteen hundred and ninety-eight, held the office of municipal captain, gobernadorcillo, alcalde, lieutenant, cabeza de barangay, or member of any ayuntamiento;

January, 1907.

(b) Those who own real property to the value of five hundred pesos, or who annually pay thirty pesos or more of the established taxes;

(c) Those who speak, read, and write English or Spanish—shall be entitled to vote at all elections: *Provided*, That officers, soldiers, sailors, or marines of the Army or Navy of the United States shall not be considered as having acquired legal residence within the meaning of this section by reason of their having been stationed in the municipalities for the required six months.

Disqualified are delinquents in taxes, and persons guilty of offenses against the sovereignty of the United States since April, 1901.

- 9 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of convention concerning the New Hebrides signed at London, October 20, 1906. *J. O.*, January 15, p. 309; *Treaty ser.*, 1906, No. 3; *Documents*, post.

The Group * * * shall form a region of joint influence, in which the subjects and citizens of the two signatory powers shall enjoy equal rights of residence, personal protection, and trade, each of the two powers retaining jurisdiction over its subjects or citizens, and neither exercising a separate control over the Group.

Times, January 8, February 18; *Parliamentary Debates*, February 13; *Louis-Jaray: La question des Nouvelles-Hébrides, Q. dipl.* See October 20.

- 11 DENMARK—GERMANY. Treaty concluded respecting the *optants* in Schleswig. The treaty between Austria, Denmark and Prussia signed at Vienna, October 30, 1864 (*State Papers*, 54:522), gave the Danes in Schleswig-Holstein annexed to Prussia, the right of choosing their nationality; by the treaty between Austria and Prussia signed at Prague, August 23, 1866 (*State Papers*, 56:1050), the population of the northern districts of Schleswig were to be ceded to Denmark, if, by a free vote, they should express a wish to be united to Denmark; by the treaty between Austria-Hungary and Germany signed Vienna, October 11, 1878 (*State Papers*, 69:773), this latter provision was canceled. The children of the the Schleswig Danes have not been regarded as subjects by either. Denmark or Prussia, excepting, under the Danish nationality law of 1898, those born subsequent to its enactment. By the present treaty, Denmark will not refuse the children of Schleswig *optants* who have not sought to acquire or who could not acquire Prussian nationality permission to reside in Denmark, and the Prussian government will allow all children of Danish *optants* to acquire Prussian nationality on the usual conditions and on

January, 1907.

their own application. *Times*, January 24; *Manuel historique de la question du Sleswig*, Copenhagen.

- 11 CUBA—DOMINICAN REPUBLIC. Ratifications exchanged at Havana of extradition treaty signed at Havana, June 29, 1905. Approved by senate of Cuba, January 10, 1906. Proclaimed at Havana, January 12, 1907. *Ga. Oficial*, January 16, 1907; *B. oficial del dep. de estado*, Havana, January, 1907.
- 12 BULGARIA—TURKEY. Commercial agreement signed at Constantinople. Imperial iradé (Turkey) approving, promulgated January 8. *Times*, January 10 and 14.
- 14 ECUADOR. Executive decree. Orders publication of a tri-monthly "Boletin del ministre de relaciones exteriores." *Registro oficial*, Quito, January 15.
- 14 ITALY—SERVIA. Treaty of commerce signed at Belgrade. *Mem. dipl.*, January 20. Approved by Skupshtina, March 1. *Mem. dipl.*, March 3.
- 15 BERMUDA—UNITED STATES. Parcels-post convention signed at Bermuda. Signed at Washington, December 13, 1906, by post-master-general; approved by president, December 18. *Stats. at L.*, vol. 34.
- 15 ECUADOR—PERU. Decree of king of Spain making appointments to the boundary commission created by decree of April 17, 1905. The commission is now composed of D. Pío Gullón Iglesias, president; D. Ricardo Beltrán y Róspide; D. Antonio Blázquez Delgado; D. Manuel Tores Campos; and D. Luís Valera y de Delavat, secretary. *Ga. de Madrid*, January 16.
- 15 SERVIA—TURKEY. Treaty of commerce published at Belgrade. Contains most favored nation clause. *Mem. dipl.*, January 20. See *January 2, 1906*.
- 16 MEXICO—UNITED STATES. Ratifications exchanged at Washington of convention signed at Washington, May 21, 1906. Ratification advised by the senate, June 26; ratified by the president, December 26; ratified by Mexico, January 5, 1907; proclaimed in United States, January 16, 1907. *Stats. at L.*, vol. 34. Equitable distribution of the waters of the Rio Grande.
- 16 FRANCE. Decree respecting admission to diplomatic and consular careers. *J. O.*, January 20, p. 448.
- 17 FRANCE. Decree repealing decree of July 10, 1902. Entrance to diplomatic and consular service. *Mem. dipl.*, January 27.

January, 1907.

- 22 HONDURAS. Ratification of two conventions signed at San José, September 24 and 25, 1906. Central American bureau and pedagogical institute. *La Gaceta*, San José, January 27. See *September 15, December 4 and 7, 1906*.
- 22 UNITED STATES. President proclaimed general act of Algeciras. See *January 16, 1906*. Additional references: *Tardieu: A Algésiras. La crise décisive, R. de deux mondes*, 38:81. On the constitution of the Moroccan Bank, *Q. dipl.* 11:309.
- 22 MOROCCO. Identic note of governments of France and Spain to the signatory powers of the Act of Algeciras, relative to execution of said Act. *Q. dipl.* 11:182. See *January 16, 1906*, and *March 26, 1907*.
- 24 PORTUGAL—UNITED STATES. Proclamation by president of the United States of the additional agreement signed at Washington, November 19, 1902, amendatory to the commercial agreement signed at Washington May 22, 1899. Applies the provisions of the latter agreement to Porto Rico. *Stats. at L.*, vol. 34.
- 24 TURKEY. The ambassadors of Italy and France at Constantinople present an identic note announcing passage under Italian protection of certain Dominican and Franciscan establishments in Constantinople, Smyrna and Barbary. *Q. dipl.*, 11:177; *Temps*, January 24, 1907.
- 25 COSTA RICA—PANAMA. Ratification by congress of Panama of boundary treaties signed at Panama, March 6, 1905. *B. A. R.*, January. A modification of the arbitral judgment of September, 1900 by the president of France between Columbia and Costa Rica. As to claim of Colombia to certain territory embraced in that award as being outside the former department of Panama, see *R. dipl.* February 24.
- 26 AUSTRIA. Law amending law of December 26, 1895. Extending in the absence of treaties, under condition of reciprocity, the provisions of that law to the works of foreign authors. *Dr. d'auteur*, February, March and April.
- 26 BRAZIL. Notification of accession to Geneva convention of August 22, 1864, for amelioration of condition of wounded in armies in the field. *Treaty ser.*, 1907, No. 6.
- 28 FRANCE—SPAIN. Ratifications exchanged at Paris of convention signed at Paris, August 18, 1904, and additional protocol signed at Paris, March 8, 1905. Construction of three trans-Pyrenean railroads. *Ga. de Madrid*, March 2; *J. O.*, February 15, p. 1225.

January, 1907.

- 28 PORTUGAL—SWITZERLAND. Ratification exchanged at Berne of commercial convention. *Mem. dipl.*, February 3.
- 30 FRANCE—HAITI. Treaty of commerce signed at Port au Prince. See *October 6, 1906*. Reciprocal tariff concessions. Also additional article for provisional effect pending exchange of ratifications. France gets 33% discount on schedule B; Haiti gets minimum tariff of France on schedule A. *Le Moniteur*, Port au Prince, February 20.
- 18/31 AUSTRIA-HUNGARY—GREECE. Publication at Athens of treaty of extradition signed at Athens, December 8/21, 1904. Approved by king of Greece, August 5, 1905. In effect date of publication.
- 31 FRANCE—SERVIA. Treaty of commerce submitted to Skupshtina. *Mem. dipl.*, February 3.
- 31 ITALY—MEXICO. Ratification and promulgation by president of Mexico of postal money-order convention signed at Mexico, February 13, 1906 and at Rome, May 9. *Diario Oficial*, Mexico, March 7, 1907.

February, 1907.

- 1 CENTRAL AMERICAN TRIBUNAL OF ARBITRATION convened at San Salvador. Adjourned February 8. This tribunal was established by the treaty between Costa Rica, Honduras, Nicaragua and Salvador, signed at Corinto, January 20, 1902. *N. R. G.*, 31:243. The present endeavor of the tribunal to avert conflict between Honduras and Nicaragua was unavailing. For proceedings and correspondence, see *Diario Oficial*, San Salvador, February 4, 6, 13 and 22.
- 7 CHINA. Imperial decree. Prevention of opium habit. *North China Herald*, February 17. See *September 20, 1906*.
- 8 DOMINICAN REPUBLIC—UNITED STATES. Treaty signed at Santo Domingo. *Documents*, post. Providing for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic. Ratification with amendments advised by the senate, February 25. To take place of unperfected treaty of February 7, 1905. *For. rel.* 1905, p. 342. By a decree (the *modus vivendi*) of the Dominican Government dated March 31, 1905, *For. rel.*, 1905, p. 366, which became operative April 1, 1905, the payment on claims against and outstanding obligations of the Dominican government were temporarily suspended and a portion of the customs collections deposited to

February, 1907.

- secure creditors, pending action on said treaty by United States senate and Dominican congress.
- 9 UNITED STATES. Deposit at Berne of ratification of convention signed at Berne, July 6, 1906, for the amelioration of the condition of wounded and sick in armies in the field. Ratification advised by senate, December 19; ratified by the president, January 2, 1907. The ratification of Siam was deposited at Berne, January 29; that of Russia, February 9; that of Italy March 9.
- 11 GREAT BRITAIN. The Korea order in council. Functions hitherto exercised by minister to Korea shall be exercised by the consul-general. *London Ga.*, February 19.
- 11 GREAT BRITAIN. The China and Korea (amendment) order in council. Making punishable offenses in China and Korea by British subjects, against the patent and trade-mark acts, when government of prosecutor provides punishment for similar acts. *London Ga.*, February 19.
- 11 GREAT BRITAIN. Order in council putting into effect on February 22 the extradition acts 1870 to 1906 in the case of the United States and of the convention signed April 12, 1905. *London Ga.*, February 12. The operation of the said acts is suspended in Canada so long as the Canadian extradition act of 1886 remains in force. For list of extradition treaties of Great Britain in force, see *Colonial Office List for 1907*, p. 463.
- 12 GREAT BRITAIN—UNITED STATES. Proclamation by president of supplementary convention for the extradition of criminals signed at London, April 12, 1905. Added to list of crimes extraditable under treaties of July 12, 1889, and December 13, 1900 (*U. S. Treaties in Force*, pp. 349, 389; *State Papers*, 71:41 and 92:72) are bribery, and offenses against bankruptcy law if made criminal by the laws of both countries. *Treaty ser.*, 1907, No. 7. See *December 21*, and *February 11*.
- 13 CANADA. Changes in tariff put into effect pending action by parliament.
- 15 UNITED STATES. Senate resolution:

WHEREAS it is alleged that the native inhabitants of the basin of the Kongo have been subjected to inhuman treatment of a character that should claim the attention and excite the compassion of the people of the United States: Therefore, be it

Resolved, That the President is respectfully advised that in case he shall find that such allegations are established by proof he will receive the cordial

February, 1907.

support of the Senate in any steps, not inconsistent with treaty or other international obligations, or with the traditional American foreign policy, which forbids participation by the United States in the settlement of political questions which are entirely European in their scope, he may deem it wise to take in coöperation with or in aid of any of the powers signatories of the treaty of Berlin for the amelioration of the condition of such inhabitants.

Congressional Record; J. dr. int. privé, 34:90. See *June 3, 1906*.

- 16 TURKEY. Fehim Pasha exiled to Asia Minor. Germany had demanded his punishment for an act of piracy. *Times*, February 18, March 23.
- 20 UNITED STATES. An Act to regulate the immigration of aliens into the United States. *Stats. at L.*, 34:898; *Documents*, post. Repeals act of March 3, 1903, except section 34, and act of March 22, 1904. Makes it a misdemeanor to encourage importation of contract labor; creates commission to investigate subject of immigration; empowers president to call an international conference or to send special commissioners to any foreign country for the purpose of regulating by international agreement, by and with the advice of the senate, the immigration of aliens. The commissioner-general of immigration is authorized to establish a division of information charged with promoting a beneficial distribution of immigrants among the states and territories. *Rossiter: The immigration law of 1907, R. of Reviews*, April; *Perkins: The Pacific coast and the orient, Independent*, February, 12, 1907. See *March 14*.
- 20 GREAT BRITAIN—SWITZERLAND. Agreement signed at Berne respecting commercial travelers' samples. *Treaty ser. 1907, No. 9*. See *November 10, 1906*.
- 23 ITALY—SERVIA. Servian skupshtina approves veterinary convention with Italy. *Mem. dipl.* March 3.
- 26 MONTENEGRO—SERVIA. Servian skupshtina approves treaty of commerce. *Mem. dipl.* March 3.
- 26 UNITED STATES. Amendments to the regulations approved February 5, 1906, governing the admission of Chinese. The most important relate to designation of officers in foreign countries to issue to Chinese subjects or citizens of such countries the certificate prescribed by section 6 of the act of 1884. A definition of the word "student" is also incorporated in the amendments. *Department of commerce and labor: Department circular No. 143*.
- 27 BULGARIA. Contract for new loan of 145,000,000f. (\$29,000,000) signed at Sofia. For conversion of loans of 1888 and 1889 and

February, 1907.

- railway construction and other purposes. Secured on surplus revenues of tobacco banderole, stamp tax and tobacco tax. *Times*, February 28. Ratified by the sobrane, March 6.
- 27 TURKEY. Note from British ambassador to the Porte communicating program of reforms in customs administration to be executed prior to increase of the ad valorem import duty. *Times*, March 5; text, *Mem. dipl.* March 24.
- 28 BRUNSWICK. The federal council of the Empire rejects application of Brunswick diet to admit youngest son of Duke of Cumberland to the succession to the throne of the duchy. The Duke of Cumberland had renounced his claims to the succession on behalf of himself and his eldest son. *Times*, January 19, March 1. On the regency see *Statesman's Year-Book* and *N. R. G.* 12:359. The Brunswick diet decided on March 12 to proceed to the election of a new regent.

March, 1907.

- 1 COSTA RICA. Consular law approved January 24 takes effect. Under article 8 consular invoices will be visaed without fee. There is substituted a tax payable by the consignee on clearing customs. *La Gaceta*, San José, January 30; *R. dipl.*, March 3.
- 1 CANADA—MEXICO. Postal convention becomes effective. *B. A. R.*, February.
- 2 UNITED STATES. An Act in reference to the expatriation of citizens and their protection abroad. *Stats. at L.*, 34:1228; *Documents*, post.
- 5 RUSSIA. Second дума opened.
- 7 FRANCE—ROUMANIA. Treaty of commerce signed at Paris. Approved by Roumanian chamber of deputies March 21. Replaces convention signed February 28, 1893 (*De Clercq: Recueil des traités de la France*, 19:558). *R. dipl.* March 31, 1907.
- 11 FRANCE—SERVIA. Treaty of commerce takes effect.
- 14 UNITED STATES. Executive order refusing permission to enter the continental territory of the United States to Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii, and come therefrom. Issued under the act approved February 20, 1907. *Documents*, post. Japanese labor competition in California had led, through racial prejudice, to exclusion by the San Francisco board of education, October 11, 1906 (repealed March 13, 1907), of Japanese children

March, 1907.

from public schools attended by aliens of other nationalities. On the legality of said action see *Geofroy v. Riggs* (1889) 133 U. S. 258, 267 as to limits of federal treaty-making power, and *Baldwin: Schooling rights under the treaty* * * *, *Columbia Law R.*, February, as to construction of treaty with Japan signed November 22, 1894; and on international demeanor see *President Roosevelt's annual message* of December 3, 1906. *Johnson: Discrimination against the Japanese in California*, Berkeley, 1907; *North China Herald*, 82:460. See February 20.

- 14 DOMINICAN REPUBLIC. Decree disapproving Italian protocols signed July 4, 1903, and May 1, 1904. *Ga. Oficial*, Santo Domingo March 16, 1907. The Dominican congress had rejected the protocols June 19, 1906.
- 15 GREAT BRITAIN—SERVIA. Treaty of commerce and navigation, signed at Belgrade, in force in Serbia. For details of the modifications introduced into the Servian general tariff by this treaty, see *Board of Trade J.*, London, March 7 and 14. Supersedes treaty signed June 28/July 10, 1893.
- 17 ROUMANIA. Anti-Semitic and agrarian riots. *The Roumanian jacquerie*, *Spectator*, March 30.
- 17 THIRD LATIN AMERICAN MEDICAL CONGRESS opened at Montevideo. *Times*, March 18. Next meeting at Rio de Janeiro, 1909.
- 21 TRANSVAAL. Parliament assembled. *Stead: The restoration of the Transvaal to the Boers*, *R. of Reviews*, April; *Delpech: La nouvelle constitution du Transvaal*, *R. du dr. public*, 24:143. See December 6.
- 22 CHINA. Last battalion of Russian troops left Kharbin for Russia. This completes evacuation of Manchuria by Russia. *Times*, March 23.
- 23 FRANCE—SIAM. Treaty signed at Bangkok, by which Siam cedes to France the territories of Battambang, Siemreap, and Sesufon; France restores to Siam Krat and Dansai, together with certain islands in the neighborhood of Krat. Frontiers to be fixed by a later protocol. France agrees that her Asiatic subjects and protégés registered after the conclusion of the present treaty shall be subject to the ordinary courts of Siam; Siam admits all the Asiatic subjects and protégés of France to the full rights of Siamese subjects, and in particular to the rights of acquiring real property, of free residence, and of free circulation. *Times*, April 3; *Mem. dipl.*, March 31. See April 14, 1906.

March, 1907.

- 28 UNITED STATES. Executive order, in pursuance of the sixth section of act of congress approved July 1, 1902. Directing Philippine commission to call general election for the choice of delegates to Philippine assembly. See *January 9*.
- 29 MOROCCO. Ujda occupied by France as means of obtaining reparation from sultan for murder of French citizen at Marakesh, March 19. See *January 16*, *April 7, 1906*. Further references: *Niemeyer: Die Marokkofrage in völkerrechtlicher Beleuchtung, Ann. des deutschen Reichs*, 1906, p. 445; *Lorin: La conférence d'Algésiras et la situation présente de la France au Maroc, R. de dr. int. public*, 1906, p. 263; *La question marocaine et la conférence d'Algésiras, Économiste française*, 1906, 1, p. 917; *Maura Gamaza: El aspecto internacional de la conferencia de Algeciras, Ateneo, Madrid*, July, 1906; *Reichs-G.* 1906, No. 52; *Treaty ser.* 1907, No. 4; *El acta de Algeciras y el porvenir de España en Marruecos, R. de dr. int. y pol. ext.*, 2:265; *Niemeyer: Le Maroc, Algésiras et le droit des gens, R. dr. int. public*, 1906, p. 174; *Diercks: Die Marokkofrage und die Konferenz von Algeciras*, Berlin, 1906; *Leblanc: La politique européenne au Maroc à l'époque contemporaine*, Paris, 1906; *Times*, March 23, 1907; *Staatsarchiv*, vol 73; *R. de dr. int. y pol. ext. Cronica*, 2:130; *Alfalo: The truth about Morocco*, London, 1904; *Hess: La question du Maroc*, Paris, 1903; *France and Morocco. Spectator*, March 30, 1907; *R. des deux mondes*, April 1, 1907.

HENRY G. CROCKER. ^

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES¹

Africa, copy of a convention signed at Brussels on Nov. 3, 1906, revising the duties imposed by the Brussels convention of June 8, 1899, on spirituous liquors imported into certain regions of. 1907. 7 p. *Senate*. (S. confidential ex. doc. C.)

Australasia and China Telegraph Co., eastern extension. Report, with accompanying papers, with reference to claim of company for compensation on account of repairing its cables, cut during the war with Spain. 1906. 13 p. *Dept. of state*. (S. doc. 99.)

Canada. Diplomatic and consular appropriation bill [H. R. 24538], boundary line between the United States and Canada. Statement of Otto H. Tittmann [Jan. 8, 1907]. 3 p. *House of reps. Committee on foreign affairs*.

Canada, estimate of appropriation for marking the boundary between the United States and. 1906. 2 p. *Dept. of state*. (H. doc. 328.)

Chicago drainage canal, report of the International waterways commission upon the. 1907. 54 p. *War dept.* Paper, 5c.

China, memorandum in regard to jurisdiction of American consular officers in, over offenses against morality and decency. 1906. 11 p. *Dept. of state*.

Citizens, report amending H. R. 24122, in reference to expatriation of, and their protection abroad. 1907. 2 p. *House of reps. Committee on foreign affairs*. (H. rp. 6431.)

Citizenship. Report on citizenship, expatriation and protection abroad. 1907. 538 p. *Dept. of state*. (H. doc. 326.) Paper, 50c.

Congo Free State. Verbatim report of five days' Congo debate in the Belgian house of representatives, Feb. 20, 27, 28, March 1, 2, 1906. 184 p. *Senate*. (S. doc. 139.)

Consular fees. Executive order. 1906. 1 p. *President*.

Consular service, executive order, amendments to regulations governing appointments and promotions in. 1906. 1 p. *President*.

¹When prices are given, the documents in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Consular service. Resolutions of National Business League, Chicago, Ill., for permanent consular improvement and commercial enlargement. 1907. 2 p. *Senate*. (S. doc. 219.)

Denmark. Agreement by exchange of notes, June, 22 and 26, 1906, with respect to protection of industrial designs and models. 4 p. *Dept. of state*.

Diplomatic and consular appropriation bill [comparative tables, 1907-8]. 2 p. *House of reps. Committee on foreign affairs*.

Diplomatic and consular appropriation bill [1908, H. R. 24538] hearing before subcommittee, Dec. 18, 1906. 1907. 30 p. *House of reps. Committee on foreign affairs*.

Diplomatic and consular service, estimate of reappropriation for contingent expenses of the. 1907. 2 p. *Dept. of state*. (H. doc. 514.)

Diplomatic and consular service, 1908, report submitting H. R. 24538, making appropriations for. 1907. 2 p. *House of reps. Committee on foreign affairs*. (H. rp. 6428.)

Ecuador, parcels-post convention between the United States and. [Signed at Washington, Dec. 28, 1906, approved, Jan. 2, 1907]. 12 p. *Post office dept.*

Foreign intercourse, estimates for, for year ending June 30, 1908. 1906. 16 p. *Dept. of state*. (H. doc. 150.)

Great Britain, *modus vivendi* between the United States and, in regard to inshore fisheries on treaty coast of Newfoundland, agreement effected by exchange of notes at London, Oct. 6-8, 1906. 4 p. *Dept. of state*.

Guatemala, convention between the United States and, for reciprocal protection of patents, signed at Guatemala City, Nov. 10, 1906. 2 p. *Dept. of state*. (Confidential S. ex. doc. B.)

Jamaica, act for the relief of the citizens of. 1907. 1 p. *Congress*. (Public act, no. 19.)

Immigration and naturalization. Annual report of the commissioner-general, 1906. 1907. 112 p. illus. *Bureau of immigration and naturalization*. Paper, 30c.

Immigration service, catalogue of books and blanks used by. 1907. 11 p. *Bureau of immigration and naturalization*.

Maritime exposition at Bordeaux, report urging that the United States be represented at the International. 1907. 6 p. *Dept. of state*. (S. doc. 242.)

Message to Congress at the beginning of the 2d session of the 59th Congress. 1906. 60 p. *President*. Paper, 5c.

Mexican water boundary commission, estimate of appropriation for expenses of. 1906. 2 p. *Dept. of state*. (H. doc. 289.)

Mexico, convention between the United States and, providing for equitable distribution of waters of the Rio Grande for irrigation purposes, signed at Washington, May 21, 1906, proclaimed Jan. 16, 1907. 5 p. *Dept. of state.*

Mexico, estimate of appropriation for carrying out convention with, as to distribution of waters of the Rio Grande. 1907. 5 p. *Dept. of state.* (H. doc. 548.)

Morocco. General act of the International conference at Algeciras and an additional protocol signed April 7, 1906. Proclaimed Jan. 22, 1907. 48 p. *President.*

Naturalization, revised estimate to carry into effect the law relating to the, of aliens. 1907. 5 p. *Dept. of commerce and labor.* (H. doc. 624.)

Naturalization laws and regulations of Oct. 1906. 21 p. *Bureau of immigration and naturalization.* Paper, 5c.

Peru, letter from the president of the senate of, expressing gratification on account of the visit of the Hon. Elihu Root. 1906. 2 p. *Senate.* (S. doc. 7.)

Peru, parcels-post convention between the United States and. [Signed at Washington, May 28, 1906, approved May 29, 1906.] 11 p. *Post office dept.*

Peru, parcels-post convention with. 1906. 1 p. *Treasury dept.* (Dept. circular 96, 1906.)

Red Cross Society, American national. Estimate of appropriation for representation at London in June, 1907. 1907. 2 p. *Dept. of state.* (H. doc. 487.)

Root, Secretary Elihu, speeches incident to the visit of, to South America, July 4 to Sept. 30, 1906. 300 p. *Dept. of state.* Cloth, 50c.

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Santo Domingo, statement of Jacob H. Hollander, Jan. 16, in reference to the debt of. 1907. 70 p. *Senate. Committee on foreign relations.*

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PHILIP DEWITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW¹

A. C. DE BACA, ET AL., V. THE UNITED STATES AND THE NAVAJO
INDIANS. 1901

36 Court of Claims Reports, 407

In this case claimants were suing under the act of congress giving the court of claims jurisdiction of claims of citizens of the United States on account of Indian depredations.

The case was submitted originally without argument and decided in favor of the claimants. The defendants then moved for a new trial on the jurisdictional question of the deceased claimant's citizenship at the time when the depredation was committed.

The facts show that the deceased claimant, Antonio Sandoval, was born a Mexican citizen, on Mexican territory. At the time of the treaty of Guadalupe-Hidalgo he was living in that part of Mexico lying on the east side of the Rio Grande river, it being a part of the Mexican department of New Mexico but claimed by the Republic of Texas as a part of its territory. The inhabitants of the territory in question had maintained their allegiance to Mexico, and Texas had been unable to exercise any of the powers of government therein. Sandoval became a citizen of the United States by virtue of the treaty of Guadalupe-Hidalgo which made the disputed territory a part of the United States.

The depredations for which damages are claimed were committed by Indians after the separation of Texas from Mexico and its admission into the Union but before the treaty of Guadalupe-Hidalgo.

The citizenship of the claimant was maintained on the ground that he was a citizen of Texas at the time of the admission of that state into the Union and therefore became a citizen of the United States upon the annexation of Texas.

On the part of the defendants it was denied that Sandoval was a citizen of Texas when it was admitted into the Union and, therefore, did not

¹The lay reader is referred to the various volumes of the reports of the court of claims for wealth of decision and interpretation of the law of nations.

A subsequent number will contain a digest of the decisions of the court of claims upon the French spoliation claims.

become a citizen of the United States until he had elected to do so under the provisions of the treaty of Guadalupe-Hidalgo.

Numerous reasons were advanced by the claimants to support their contention, and the court answered them *seriatim*, as follows:

The first reason assigned was that the constitution of Texas made all inhabitants citizens of the republic, and that the act of the Texas legislature of December 19, 1836, fixed the western boundary of the state at the Rio Grande. But the court said:

It is manifest that the state could not acquire territory by statute, and that it had no more legal right to declare a part of the Mexican province of New Mexico a part of Texas than it had a right to make a part of the state of Louisiana a part of Texas.

The next reason assigned was that by the treaty between the United States and Texas in 1836, the United States recognized the territory of Texas as extending westward to the sources of the Rio Grande. To which the court replied:

But Texas was then at war with Mexico, endeavoring to acquire a part of the territory within the Mexican province of New Mexico. The United States did not undertake to arbitrate between Mexico and Texas. All that the treaty did was to establish a boundary line between the territory possessed by Texas and the territory possessed by the United States, and to concede that if Texas should conquer this portion of Mexico the river should be the future boundary between Texas and the United States.

The next reason assigned was that the United States recognized the territory claimed by Texas, and that the courts of the United States must follow the action of the political branches of the government. The court answered:

But the joint resolution for annexing Texas, March 1, 1845 (5 Stat. L., 797), does not sustain the reason. On the contrary, congress seems to have carefully avoided doing so, and to have recognized the principle that Texas could not cede what it did not possess. All that the resolution says is "*the territory properly included within and rightfully belonging to the Republic of Texas* may be erected into a new state to be called the state of Texas." The question now presented to the court is whether this portion of New Mexico was, in 1845, "*territory properly included within and rightfully belonging to the Republic of Texas.*" The joint resolution admitting the state to the Union, twenty-ninth December, 1845 (9 Stat. L., 108), reiterates the above language and designates no boundary. The act to extend the laws of the United States over the state of Texas, twentieth-ninth December, 1845 (*ib.*, p. 1), is equally silent as to boundaries.

The next reason assigned was that the United States asserted, after the annexation, that the Rio Grande, and not the Neucos, was the boundary of Texas, and declared war to maintain that right. But the court said:

The intent of the United States did not necessarily extend beyond that portion of Texas which was then actually inhabited and possessed by Americans between the Neuces and the Rio Grande and which had been "properly included within and rightfully belonging to the Republic of Texas," and, by virtue of those terms, ceded to the United States.

The next reason assigned was that by the act of March 3, 1847 (9 Stat. L., 188, 194), a post route was established by congress from a point within the United States (Independence, Mo.) to the town of Santa Fé, in New Mexico, to which the court answered:

But New Mexico was then held by conquest, and had been for six months, and civil government had been established by the commanding officer of the United States, General Kearny, with the approval of the secretary of war. It was necessary that the United States should have mail communication within the territory, which it then possessed by right of conquest, and this conquest was subsequently made permanent, by the treaty of Guadalupe-Hidalgo.

Moreover, the establishment of such a post route means nothing as a declaration that Santa Fé was in Texas, for the act third March, 1851 (9 Stat. L., 637, 2), confers upon the postmaster-general power "to make suitable arrangements for transporting through any foreign country the mails of the United States, running from and to any point in the United States." In other words, it authorizes a post route through a foreign country.

The final reason assigned was that the United States by the act of May 9, 1850 (9 Stat. L., 446), paid to Texas \$10,000,000 in consideration of the cession of all territory claimed by the state. But the court answered this contention in the following language:

At that time the United States had acquired title to all of New Mexico by virtue of its right of conquest and the affirmance thereof by the treaty with Mexico. The United States and Texas were, therefore, asserting adverse titles against each other. The fact that the United States paid money to quiet title and to acquire a quit claim from the state of Texas of lands to which Texas asserted a title can not possibly affect, directly or indirectly, the prior citizenship of a person living within the disputed territory. The statute concedes nothing and declares nothing which the judicial branch of the government can recognize as in any way affecting the question now in controversy.

The defendants' motion for a new trial was allowed and a new trial granted.

CHAUNCEY THOMAS V. THE UNITED STATES. 1903

39 Court of Claims Reports, 1

This was a case which involved the question as to whether or not war existed in the Philippines after the ratification of the treaty with Spain but before the suppression of the Filipino insurrection.

The question was raised under the following state of facts:

An American naval officer was assigned, from July 11, 1899, until August 15, 1899, to duties of a higher character than those ordinarily imposed on an officer of his rank, and brought this suit to recover the difference in pay for the period in question. The provisions of the statute, under which he sued, authorizing such pay, were only applicable for services rendered "in time of war." The war with Spain ceased with the ratification of the treaty on April 11, 1899, before the rendition of the services claimed for, but the insurrection had not ended.

Numerous rulings of the war department were cited holding that a state of war did exist in the Philippines after the ratification of the treaty with Spain and during the insurrection.

The court held that

"while the question is not free from doubt because of the absence of a war technically, or in an international sense," still "the insurrection which resulted in a condition of war in the Philippine Islands was such as to bring the claimant's services within the terms of the statute as having been rendered 'in time of war.' "

THE PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY (LIMITED)
V. THE UNITED STATES. 1904

39 Court of Claims Reports, 225

This was an action for the recovery of rent for the use and occupation of certain buildings and a tramway in the Philippine Islands. The property was owned by the order of Dominican friars, who made a contract for its sale to one Richard Henry Andrews, a British subject, now deceased. Andrews acquired title August 8, 1898, and transferred his interest to the plaintiff company, which was incorporated in January, 1900. The authorities of the United States came into the possession of the premises after the insurgents (who had previously taken forcible possession), and occupied and used the parcels set forth in the findings. No compensation or rental was paid for the use, but at no time has any claim of title or equity been asserted by the United States. Claims for rent of the property were recognized as just, but doubts as to the true ownership having been suggested by various military and civil officers of the government, compensation had been withheld until the doubt as to the title could be determined.

Under these circumstances there was no express contract for the government to pay, but the court held that a promise would be implied to pay a reasonable rent to the true owner.

The defendants first set up a want of jurisdiction, claiming that the right to bring an action given by §1068 of the Revised Statutes of the United States, did not include individuals in the colonies of those nations, although the citizens or subjects of the same nations domiciled at home had the right to sue. The statute referred to reads as follows:

Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

The court, however, said:

We are unable to see any reason why an alien, whether citizen of France or subject of Spain, possessing the right to prosecute claims in this court under the statute cited should be denied the right to sue if residing in the colonies of such governments.

And further, that

the statute makes no distinction between natural and artificial persons.

But the court denied that the plaintiff company was a foreign association, and held that the

national character of a corporation arises from the jurisdiction in which and in accordance with the laws of which it is organized.

The plaintiff company was organized according to the local laws of the Philippines and domiciled at the place of incorporation; all the requirements of the local laws in such cases made and provided were met, and the company was, therefore, domestic. Moreover, the recitals in the articles of incorporation as to the presence of foreigners would not operate to make the company foreign, for it would be legally presumed that the company was composed of citizens of the state which created it.

Said the court:

In the controversy between the present parties the fact that the articles of association show the presence of foreigners is not sufficient to change a domestic company into a foreign body politic, and the national character of the company which brings this action must be determined from the local jurisdiction which gave it being, irrespective of the individual incorporators.

Another point made by the defendants was that the company, legally considered, had no power to acquire or manage real property in the Islands, and an opinion of the attorney-general of the Philippines was cited in support of the argument. For the purpose of answering this point, the court assumed that the presence of foreigners among the individual incorporators made the company foreign in character. On

this assumption, the court held that power to acquire, hold, and dispose of real property was a civil right secured to foreign persons, both natural, and "judicial," by the laws of Spain. But it was argued that the Maura decree, promulgated February 13, 1894, forbade plaintiff, if a foreign corporation, to hold property; to which the court replied:

The Maura decree was an administrative law for the benefit of the state. It ought not to be held to abrogate a civil right by implication because civil rights are not regulated by administrative laws. The decree was not meant to regulate civil rights, but pertained solely to the acquisition, classification, and tenure of state lands. As the civil code conferred upon foreigners equality of civil rights with natives, and specifically conferred upon foreign corporations domiciled in Spain the nationality of Spain, we do not think that a law relating to lands of the crown superseded or was intended to supersede rights conferred by the civil code.

It was then contended by the defendants that the local authorities were not competent to create the plaintiff a corporation. The treaty with Spain ceding the Philippines was ratified in April, 1899, and the company was organized in January, 1900, under the Spanish laws claimed to be in force in the Philippines after the treaty of Paris. The ground of the defendants' contention was that at the time of the cession of the archipelago, only such laws were continued in force as did not involve a sovereign grant—the right to any kind of a charter under local regulations being included. On this point the court, after citing the general rule of international law in regard to all conquered or ceded territory, that the old laws continue until repealed by the proper authorities, quoted the following passage from the decision of Chief Justice Marshall in *American Insurance Company v. Canter* (1 Peters, 511):

On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.

A distinction was then drawn between special privileges granted by the ceding sovereignty to a particular person or body and those granted under general municipal laws. The court said:

Special privileges, grants, or franchises flowing from the grace and pleasure of the sovereign in favor of some one particular person or body distinguished from the general body of the inhabitants are the things forbidden. It needs no reference to international law to say that any exercise of authority by the ceding sovereignty, after cession, could not have force with reference to such things as grants of land, or the

bestowal of special franchises, such as the construction of roads, the keeping of ferries, and the erection of bridges with the right to collect toll upon them. These are grants by the authority of the state as particular privileges which look to the promotion and protection of the public good. But the municipal laws promulgated during the time the ceding authority existed and which are generally recognized as necessary to the peace and good order of the community remained in full force and effect. Any other rule would hold in abeyance civil functions with respect to the use, enjoyment, and transfer of private property that would lead to results harmful to the inhabitants of the ceded territory and injurious to the best interests and authority of the new sovereign as well. This is something that has not been tolerated in modern times.

The court finally held that the existence of a state of insurrection at the place of incorporation would not affect the validity of judicial acts (which would include the incorporation of this association under the municipal law), which were not hostile in their purpose or method of enforcement to the authority of the national government.

Judgment was therefore given for the plaintiff

WARNER, BARNES AND CO. (LTD) V. THE UNITED STATES. 1904

40 Court of Claims Reports, 1

The facts of this case were as follows:

The plaintiff, an English corporation engaged as a general commission mercantile trading house in the port of Manila and other ports in the Philippine Islands, imported, as a part of its business, certain goods from the United States, after the ratification of the treaty between Spain and the United States but before the end of the Filipino insurrection, upon which goods the military authorities of the United States in control of the islands levied tariff duties as military contribution, not under the authority of the general laws of the United States, but under authority of the orders of the president, the proceeds of which duties were used in suppressing the insurrection.

The plaintiff now sues for the recovery of these duties on the ground that when the treaty with Spain was ratified, the war in the Philippines ceased and the government passed into the hands of the civil authorities of the United States, thus making illegal the war contributions exacted by the military authorities.

After reviewing the operations of the United States forces in the Philippines and the resistance offered by the insurgents, the court decided that notwithstanding the ratification of the treaty of peace with Spain, a state of war did exist in the Philippines until the United States had suppressed armed resistance to its authority. The court said:

That such war did exist before and after the exchange of ratifications of the treaty with an armed military power in said islands is beyond dispute, and whether such war was declared or recognized in a particular manner or not, it seems to us, is but to beg the question.

The court then proceeded to hold that the question of war is one to be determined by the political department of the government, and that the president and congress did once and again recognize a condition of war in the archipelago.

Continuing, the court said:

The vital point is that until the military forces of the United States had suppressed armed resistance against its authority and established its sovereignty in the islands, the government could not give the effect to the treaty contemplated by the high contracting parties.

In holding that the levying of the duties in question were, therefore, legal, the court said:

In time of war, within the military district of its operation, no restrictions are placed upon the power and authority of the military commander except such as are imposed by the common consent of all civilized people. His power is absolute within the radius of his jurisdiction. He may prohibit or restrict all trade or commerce within his lines. As a condition to commerce within his military district he may impose contribution to assist in the expenses of the war or in giving such care to indigent non-combatants as humanity may require. These principles are, it seems to us, elementary and have their existence in long-established and universal usage. They pervade the pages of history. Authorities are unnecessary to prove their existence, but recognition has been given them in *Matthews v. McStea* (91 U. S., 9); *Prize Cases* (2 Black., 635); *Hamilton v. Dillin* (21 Wall., 73).

GALBAN AND COMPANY, A CORPORATION, V. THE UNITED STATES. 1905

40 Court of Claims Reports, 495

This is a case where an American corporation doing business in Cuba during the military occupation of the United States imported merchandise from the United States after the treaty of peace between the United States and Spain, upon which it was required to pay duties by the military government. The duties were imposed under the authority of the president as commander-in-chief of the army. The money was expended for the necessary governmental purposes incident to the occupation of Cuba. The claimant brought this suit to recover back the money so paid.

The claimant's contention is based upon the ground that by Article I of the treaty with Spain the sovereignty of the people of the island of Cuba and the title to the island passed to the United States, and, there-

fore, the imposition of customs duties upon merchandise imported into the island from the United States without express authority from congress was unlawful and illegal.

By Article I of the treaty it was provided:

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

By Article XVI of the treaty, the obligations assumed by the United States in respect to Cuba were limited "to the time of its occupation thereof."

The court held that the theory of the claimant that sovereignty over and title to Cuba vested in the United States upon the relinquishment thereof by Spain is negated by the language of the treaty in the above articles, and also by the express disclaimer of the congress of the United States in the fourth section of the joint resolution which it passed and was approved April 20, 1898, which reads as follows:

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

This holding of the court that Cuba was, during the occupation thereof by the military forces of the United States, foreign territory, would have been sufficient ground for rejecting the claimant's petition without further argument, but the court proceeded to justify the collection of the duties as follows:

The occupancy of Cuba by troops of the United States was a necessary result of the war imposed upon the United States by the principles of international law, and during such occupancy the president had the undoubted right to prescribe rules and regulations having the force of law for the peaceable government of the island. The powers and functions which were exercised by the United States were those of a trustee for the protection and security of persons and property, having in view the restoration of confidence, and the encouragement of the people to resume the pursuits of peace. In furtherance of that trust it became necessary to levy the duties, part of which were paid by the claimant. It would have been an act of bad faith and a breach of trust had the merchandise of a citizen of the United States imported into Cuba from the United States been exempted from the payment of such duties, because the people of Cuba were entitled not only to have the revenues honestly

collected but were entitled to have all the revenues accruing to the island, from whatever sources, applied to the pacific object of the occupation.

The petition was accordingly dismissed.

CHARLES F. WYMAN, PETITIONER; JOHN W. M'EVOY, PUBLIC ADMINISTRATOR, V. CHARLES F. WYMAN. 1906

191 Mass. 276

Executor and Administrator—Constitutional Law—Treaty—Russia.

Under the existing treaties, which are the supreme law of the land, the petition of the consular representative of the empire of Russia for this commonwealth, to be appointed administrator of the estate of a Russian subject who died here, must be granted against the objection of the public administrator.

Two appeals, from decrees of the probate court for the county of Middlesex.

Julius Saposnick, alias Sapoznik, alias Sapognick, died intestate in Cambridge in the county of Middlesex, on July 9, 1902, leaving personal property to be administered upon in that county. He was a citizen and subject of the empire of Russia and left in the United States no widow, heirs at law or next of kin; but left in Vilna, Russia, a widow and three minor children.

Charles F. Wyman of Cambridge is vice-consul of the empire of Russia at Boston, Massachusetts, and the consular representative of that empire for the commonwealth of Massachusetts. On May 12, 1903, as such vice-consul he filed a petition to be appointed administrator of the estate of Julius Saponznick, above named, claiming the right to administer the estate under the treaty between the United States and the empire of Russia.

On May 27, 1903, John W. McEvoy, public administrator for the county of Middlesex, filed a petition to be appointed administrator of the estate of the same man.

In the probate court, McIntire, J., dismissed the petition of the Russian vice-consul, stating in his decree,

it not appearing that he has a legal right to be appointed administrator of the said estate to the exclusion of a public administrator.

On the same day he allowed the petition of the public administrator, and decreed that letters of administration on the estate should be granted to him.

Charles F. Wyman, the Russian vice-consul, appealed from both decrees.

The cases came on to be heard before Knowlton, C. J., who by agreement of the parties reserved them upon the pleadings and an agreed statement of facts for determination by the full court, such entries to be made as law and justice might require.

F. R. Coudert (of New York) (J. H. Appleton with him), for the petitioner.

F. T. Field, assistant attorney-general, for the public administrator.

Lathrop, J. On the agreed facts in this case we have no doubt that the judge of the probate court erred in appointing a public administrator as administrator of the estate of a Russian subject dying here intestate and leaving personal property, and in dismissing the petition of the Russian vice-consul on the ground that it did not appear that he had a legal right to be appointed administrator of the estate to the exclusion of the public administrator.

By article 8 of the treaty of 1832, between Russia and the United States, it is provided:

The two contracting parties shall have the liberty of having in their respective ports consuls, vice-consuls, agents, and commissaries, of their own appointment, who shall enjoy the same privileges and powers as those of the most favored nations.

The same treaty in article 10 provides:

The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases.

Under the most favored nation clause, reliance is had upon the provisions of article 9 of the treaty of 1853 between the Argentine Republic and the United States, which read as follows:

If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

See also the treaty between Costa Rica and the United States of 1851, article 8.

There is but little authority directly in point, on the question raised by this appeal. In *Lanfear v. Ritchie*, 9 La. Ann. 96, decided in 1854,

the decision was against the vice-consul of Sweden and Norway, on the ground that the right claimed was "incompatible with the sovereignty of the state." But this was at a time when we might expect the doctrine of state rights to be strongly insisted upon. On the other hand, there are two decisions in the surrogate's court for Westchester county, New York, which fully sustain the position of the vice-consul in the case before us. These cases are well considered and cover the entire ground. *Estate of Tartaglio*, 12 Misc. (N. Y.) 245. *In re Fattosini*, 33 Misc. (N. Y.) 18.

None of these cases is binding upon us, and the case must be decided on general principles.

Among the powers conferred upon the president by article 2, §2, of the constitution of the United States is this:

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.

By article 6 it is declared:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Treaties are to be liberally construed. *Shanks v. Dupont*, 3 Pet. 242, 249. *Hauenstein v. Lynham*, 100 U. S. 483, 487. When, then, anything in the constitution or laws of a state are in conflict with a treaty, the latter must prevail, and this court has not hesitated to follow this rule, which is generally recognized as the law of the land. *Tellefsen v. Fee*, 168 Mass. 188; *Ware v. Hylton*, 3 Dallas, 199, 237; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188, 197; *Hauenstein v. Lynham*, 100 U. S. 483, 489; *Head Money Cases*, 112 U. S. 580, 598, per *Miller*, *J. Geofroy v. Riggs*, 133 U. S. 258, 267; *in re Parrott*, 1 Fed. Rep. 481.

While it may be true that there is some limit to the powers of the president and senate in making treaties, as has been intimated in some of the cases in the supreme court of the United States, we cannot accede to the contention of the counsel of the public administrator, that the treaties in question in this case are beyond the jurisdiction of the treaty making power; nor can we accede to the further contention as to the construction of the treaty which was adopted by the judge of the probate court.

We might perhaps stop here, but as the question of giving a bond is sure to arise, we are of opinion that the vice-consul, as he has applied for

letters of administration, and thus has submitted himself to the court, should be required to give a bond, and in other respects to conduct himself with respect to the estate as would any other administrator.

The order therefore will be

Decrees of the probate court reversed.

ZARTARIAN V. BILLINGS. SUPREME COURT OF THE UNITED STATES, 1907

203 U. S.

Mr. Justice Day delivered the opinion of the court.

This is an appeal from an order of the circuit court of the United States for the district of Massachusetts, denying a petition for a writ of *habeas corpus* filed by Charles Zartarian in behalf of Mariam Zartarian, his daughter, who, it was alleged, was unlawfully imprisoned, detained and restrained of her liberty at Boston by the United States commissioner of immigration, which imprisonment was alleged to have been in violation of the constitutional rights of the said Mariam Zartarian, without due process of law and contrary to the provisions of §2172 of the Revised Statutes of the United States, which section, it is alleged, made said Mariam a citizen of the United States by virtue of the citizenship of her father, the petitioner.

The United States district attorney and the attorney for the petitioners stipulated the following facts:

The petitioner, Charles Zartarian, formerly a subject of the sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, at the circuit court of Cook county in the state of Illinois. That his daughter Mariam, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner leaving Turkey. That in the latter part of the year 1904 the Turkish government, at the request of the United States minister at Constantinople, granted permission to the petitioner's wife, minor son, and his said daughter, Mariam, to emigrate to the United States, it being stipulated in the passport issued to them that they could never return to Turkey. That on March 22, 1905, the Hon. G. V. L. Meyer, then United States ambassador at Rome, Italy, issued a United States passport to your petitioner's said wife and daughter. That said Mariam arrived at Boston from Naples, Italy, on April 18, 1905, and that on April 18, 1905, she was found to have trachoma, and was debarred from landing by a board of special inquiry appointed by the United States commissioner of immigration for the port of Boston.

The petitioner's child, Mariam Zartarian, was debarred from landing at the port of Boston under the provisions of the act of March 3, 1903, chap. 1012, 32 Stat. 1213, U. S. Com. Stat. 1901, Supp. of 1903, p. 170,

entitled "An act to regulate the immigration of aliens into the United States."

Section 2 of that act, among other things, provides that certain classes of aliens shall be excluded from admission to the United States, including "persons afflicted with a loathsome or with a dangerous contagious disease." Upon the finding of the board of inquiry that said Mariam had trachoma, she was debarred from landing.

The contention is that she does not come within the terms of this statute, not being an alien, but entitled to be considered a citizen of the United States, under the provisions of §2172 of the Revised Statutes, which provides:

The children of persons who have been duly naturalized under any law of the United States * * * being under the age of twenty-one years at the time of naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

As Mariam was born abroad, a native of Turkey, she has not become a citizen of the United States, except upon compliance with the terms of the act of congress, for, wanting native birth, she can not otherwise become a citizen of the United States. Her right to citizenship, if any she has, is the creation of congress, exercising the power over this subject conferred by the constitution. (*United States v. Wong Kim Ark*, 169 U. S. 649, 702.)

The relevant section, 2172, which it is maintained confers the right of citizenship, is the culmination of a number of acts on the subject passed by congress from the earliest period of the government. Their history will be found in vol. 3, Moore's International Law Digest, p. 467.

The act of 1872 is practically the same as the act of April 14, 1802 (2 Stat. 153), which provided:

The children of persons duly naturalized under any of the laws of the United States * * * being under the age of 21 years at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who are now or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered citizens of the United States.

In *Campbell v. Gordon* (6 Cranch. 176), it was held that this act conferred citizenship upon the daughter of an alien naturalized under the act of January 29, 1795, she being in this country at the time of the passage of the act of April 14, 1802, and then "dwelling in the United States."

The act has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when "dwelling in the United States." (*Boyd v. Thayer*, 143 U. S. 135, 177.)

The construction of this law and the meaning of the phrase "dwelling in the United States" has been the subject of much consideration in the executive department of the government having to do with the admission of foreigners and the rights of alleged naturalized citizens of the United States. The rulings of the state department are collected in Professor Moore's Digest of International Law, vol. 3, p. 467, *et seq.*

The department seems to have followed a rule established at an early period, and formulated with fullness in Foreign Relations for 1890, p. 301, in an instruction from Mr. Blaine to Minister Phelps, at Berlin, in which it was laid down that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child if, at the time of the father's naturalization, dwelling within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority.

Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parents' naturalization, but coming therein during minority, acquires citizenship is not a question now before us.

The limitation to children "dwelling in the United States" was doubtless inserted in recognition of the principle that citizenship can not be conferred by the United States on the citizens of another country when under such foreign jurisdiction; and is also in deference to the right of independent sovereignties to fix the allegiance of those born within their dominions, having regard to the principle of the common law which permits a sovereignty to claim, with certain exceptions, the citizenship of those born within its territory.

It is pointed out by Mr. Justice Gray, delivering the opinion in *United States v. Wong Kim Ark* (169 U. S. 649, 866), that the naturalization acts of the United States have been careful to limit admission to citizenship to those "within the limits and under the jurisdiction of the United States."

The right of aliens to acquire citizenship is purely statutory; and the petitioner's child having been born and remaining abroad, clearly does not come within the terms of the statute. She was debarred from entering the United States by the action of the authorized officials, and, never having legally landed of course could not have dwelt within the United States. (*Nishimura Ekiu v. United States*, 142 U. S. 651.)

It is urged that this seems a harsh application of the law, but if the terms of the statute are to be extended to include children of a naturalized citizen who have never dwelt in the United States, such action must come from legislation of congress and not judicial decision. Congress

has made provision concerning an alien's wife or minor child suffering from contagious disease, when such alien has made a declaration of his intention to become a citizen, and when such disease was contracted on board the ship in which they came. holding them under regulations of the secretary of the treasury until it shall be determined whether the disorder will be easily curable, or whether such wife or child can be permitted to land without danger to other persons, requiring that they shall not be deported until such facts are ascertained (37 Stat. 1221, U. S. Comp. Stat. 1901, Supp. of 1903, p. 185). But congress has not said that an alien child who has never dwelt in the United States, coming to join a naturalized parent, may land when afflicted with a dangerous contagious disease.

As this subject is entirely within congressional control, the matter must rest there; it is only for the courts to apply the law as they find it.

It is suggested that the agreed finding of facts contains no stipulation as to the dangerous or contagious quality of trachoma, but the petition shows that the petitioner's daughter was debarred from landing because it was found that she had a dangerous contagious disease, to wit, trachoma. Furthermore, the statute makes the finding of the board of inquiry final, so far as review by the courts is concerned, the only appeal being to certain officers of the department. (32 Stat. 1213; *Nishimura Ekiu v. United States*, 142 U. S. 651.)

Finding no error in the order of circuit court, it is affirmed.

HIGH COURT OF JUSTICIARY OF SCOTLAND. (FULL BENCH)

(The Lord Justice-General, The Lord Justice-Clerk, Lords M'Laren, Kyllachy, Stormonth-Darling, Low, Pearson, Arduvall, Dundas, Johnston, Salvesen, and Mackenzie.)

MORTENSEN V. PETERS

Justiciary Cases—Jurisdiction—Herring Fishery Laws—Foreigners Fishing Within Prohibited Area—Sea Fisheries (Scotland) Amendment Act, 1885 (48, 49 Vict. C. 70), §7—Herring Fishery (Scotland) Act, 1889 (52 & 53 Vict. C.23), §7 (1)—Herring Fishery (Scotland) Act. Amendment Act, 1890 (53 & 54 Vict. C. 10)—Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. C. 42), §10 (4).

Stated Case

This was an appeal against a conviction obtained against the appellant in the sheriff court at Dornoch on a complaint which charged:

That Emmanuel Mortensen, residing at 24 Montague street, Grimsby, has been guilty of a contravention of the sea fisheries acts and the herring fisheries (Scotland) acts, in so far as on thirtieth November, 1905, he, being the master of the Norwegian steam trawler *Niobe*, S. D. 5, of Sandefjord, Norway, did, contrary to the bye-laws and sections of the statutes after mentioned, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, and is within the area specified in the bye-law No. 10 made by the fishery board for Scotland, under the powers conferred by the sea fisheries (Scotland) amendment act, 1885, the herring fishery (Scotland) act, 1889 (particularly §7 (1) thereof), and the herring fishery (Scotland) act amendment act, 1890, dated said bye-law at Edinburgh on twenty-seventh September, 1892, confirmed by her late majesty's secretary for Scotland on twenty-second November, 1892, and published in the Edinburgh Gazette on twenty-fifth November, 1892, as amended by bye-law No. 14, made by the said fishery board under the powers conferred by the herring fishery (Scotland) act, 1889, §7 (1), dated said bye-law at Edinburgh on seventeenth April, 1896, confirmed by her late majesty's secretary for Scotland on sixth August, 1896, and published in the Edinburgh Gazette on eighteenth August, 1896, a copy of which bye-laws, certified by the secretary of said fishery board, is produced herewith, whereby the said Emmanuel Mortensen is, on conviction, liable in terms of the sea fisheries regulation (Scotland) act, 1895, §10 (particularly sub-section 4 thereof), to a fine not exceeding £100, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by pouding or arrestment, if no imprisonment has followed on the conviction; and further, to forfeiture to every net set or attempted to be set by him at the time and place libeled, in contravention of the bye-laws above mentioned. That by virtue of the powers conferred by §7, of the sea fisheries (Scotland) act amendment act, 1885, the said fishery board have declared that the sheriff court at Dornoch is the most convenient court for the trial of the charge above libeled, conform to notice under the hand of the secretary to said board, dated fifth January, 1906, herewith produced.

At the trial the appellant stated as a preliminary objection that said steam trawler being registered in Norway and the locus of the offense being as alleged, the appellant was not subject to the jurisdiction of Dornoch sheriff court. Under reservation of the said objection, the appellant pleaded not guilty.

It was proved that said steam trawler was registered in Sandefjord, Norway, and that the appellant was a Dane.

It was further proved that the appellant did on thirtieth November, 1905, being the master of said steam trawler, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; and there was produced and proved an admiralty chart, having marked thereon the foresaid position of said steam trawler, which position was

outwith a line drawn at a distance of one marine league from low-water mark on the adjacent coast, and within ten miles of the coast.

There were produced by witnesses for the prosecution the following documents, which were duly proved, viz: (1) A certificate by the secretary of the fishery board, dated fifth January, 1906, declaring the sheriff court at Dornoch to be the most convenient for the trial of the appellant; (2) a print of bye-laws made by the fishery board, including said bye-laws Nos. 10 and 14; (3) a copy of the Edinburgh Gazette of twenty-fifth November, 1892, containing said bye-law No. 10 as confirmed by her late majesty's secretary for Scotland; (4) a copy of the Edinburgh Gazette of eighteenth August, 1896, containing said bye-law No. 14 as confirmed by her late majesty's secretary for Scotland; and (5) a report, dated fourth December, 1905, by W. H. Lampard, an officer of his majesty's customs at Grimsby, giving the names, ratings, nationality and addresses of the crew of said steam trawler.

The sheriff repelled the appellant's said preliminary objection, found the appellant guilty of the contravention charged, fined him in the sum of £50 of modified penalty, and in default of immediate payment thereof decerned him to be imprisoned for the space of fifteen days. The appellant paid the fine.

The questions of law, submitted for the opinion of the high court of justiciary were:

1. Whether, in view of the facts stated as proved, and having regard to the bye-laws and the enactments of the sections of the statutes above mentioned, the appellant was subject to the jurisdiction of Dornoch sheriff court?

2. Whether, having regard to the provisions of the sea fisheries regulation (Scotland) act, 1895, and in particular to the provisions of §10, sub-sections 4 and 6 thereof, the conviction and sentence imposed on the appellant are legal and competent?

Argued for appellant: 1. The statutes and bye-laws on which this prosecution is founded are municipal statutes and bye-laws and, therefore, only confer jurisdiction over (1) British subjects, and (2) foreign subjects within British territory. There is no reservation in the statutes of the rights of foreigners, but the words "any person" mean "any person over whom the courts have jurisdiction." Our legislation is primarily territorial. It can at least in no case apply to foreigners outside British territory. (Maxwell on the Interpretation of Statutes, 4th ed., pp. 218, 226, 411.) Of course, if there is in a statute an express application to foreigners, the courts would enforce it, and the pleas of no jurisdiction would be of no avail. (The *Zollverein*, 1856, Swa. 96, per Dr. Lushing-

ton at 98; Story on the Conflict of Laws, 8th ed., §7; *in re A. B. & Co.* [1900], 1 Q. B. 541, per Lindley, M. R., 544.) Parliament is to be presumed to legislate so as not to do anything contrary to international law. (*Rose v. Hineley*, 1808, 2 Curtis (U. S.), 87, per Marshall, C. J., at 95-6; *Hardcastle on Statutory Law*, 3d ed., p. 413; *Hall's Foreign Jurisdiction of the British Crown* (1894) pp. 242, 246; *The Queen v. Keyn (Franconia case)* [1876], L. R., 2 Ex. D. 63). The decision in the *Franconia* case is still law, except so far as altered by the territorial waters jurisdiction act (1878, 41 and 42 Vict. c. 73), *i.e.*, at common law there is no jurisdiction below low-water mark; unless in Scotland according to the decisions it extends to the three-mile limit. (*Franconia* case, per Cockburn, C. J., at p. 210.) [The lord justice general referred to the argument in the *Franconia* case to show that the protection of fisheries may be in the same position as revenue, and that the courts may have jurisdiction over foreigners without the three-mile limit for this purpose.] Fisheries are not in an exceptional position. What Cockburn, C. J., refers to, is something of the nature of preventive jurisdiction ancillary to an exclusive right in territorial waters. (Wheaton's Int. Law, 4th ed., p. 279.) The right of regulating fisheries is based on no law, and has no history. It is not a right of any nation in waters not territorial. (Ortolan's *Diplomatique de la Mer*, pp. 145, 153.) Counsel referred to *Cope v. Doherty* [1858], 4 K. and J., 367, 2 DeG. and J., 416; *Niboyet v. Niboyet*, 1878, 4 P. D., 1, per Brett, L. J., at 19-20; *The Annapolis*, 1861, Lush. 295 at 306; Wharton's International Law Digest, ch. I. §9; *Poll v. Lord Advocate* 1899, 1 F. 823. The propositions put forward in state papers are the best evidence obtainable of international law at the time. In the *Behring Sea* arbitration (1893) the United States case referred to this legislation with reference to herring fisheries as an example of legislating for foreigners outside the territory. The British case (p. 51) repudiated that construction of the statutes. In the matter of fishings the government will not claim to legislate so as to cover foreigners. It is unlikely that parliament would violate what the country's representatives so put forward as international law.

2 The appellant was not within British territorial waters when he is alleged to have contravened the bye-law, and it is admitted that he is not a British subject. International law is part of the common law which the courts administer. (*West Rand Central Gold Mining Co. v. The King* [1905], 2 K. B. 391, per Lord Alverstone, C. J., at 405-6.) There are persons to whom the statute would not be applicable, *e.g.*, the sovereign or a foreign ambassador, so that it is not universally applicable. (*Triquet v. Bath*, 1764, 3 Bur. 1478, per Lord Mansfield; *Heathfield v. Chil-*

ton, 1767, 4 Bur. 2106, per Lord Mansfield.) By international law territorial jurisdiction ends at the three-mile limit, with the exception of bays *intra fauces terræ*. (Lord Advocate v. Clyde Navigation Trs. 1891, 19 R. 174.) The three-mile limit and this single extension are well established. There is no case when a bay eighty miles wide has been held to be *intra fauces terræ*. So far as any width is laid down as a limit the maximum is ten miles. *Fauces* refers to something narrow. (Lewis and Short's Dictionary.) The idea is that of a land-locked bay. (The *Twee Gebroeders*, 1801, 3 Chas. Rob. 336; Vattel's *Droit des Gens*, §291.) The bays included are such as can be defended from the shore. (Stair, II, i, 5; Moore on the Foreshore, p. 376, quoting Hale's *De Jure Maris*; Westlake's *International Law*, p. 187; Nys' *Le Droit International*, vol. i, p. 446.) The Moray Firth does not satisfy the requirements of any of the writers as to *intra fauces terræ*. Acquiescence in a place being regarded as territorial may make it so. (Direct U. S. Cable Co., Ltd. v. Anglo-American Telegraph Co., Ltd., 1877, 2 A.C. 394, per Lord Blackburn at 417, 419, 420; The Queen v. Cunningham, 1859, Bell's C.C.R. 72; Westlake's *International Law*, p. 185.) But there is no such claim put forward here. In the North Sea convention the North Sea is defined so as to include the Moray Firth, and the convention admits that the waters therein dealt with are outside territorial limits. Norway is not a party to the convention, but if the appellant was a Frenchman, and he said he stood on his rights under the convention, the courts would not construe the statute so as to make it a variance with the convention. The court, therefore, cannot construe it differently according to the nationality of the accused. In *Peters v. Olsen*, 1905, 7 F.J. 86, the trawler was caught within a ten-mile limit defined by the convention. It was under a different bye-law, and has no bearing on this case. Any opinions affecting this case were *obiter*. It is not the law of Scotland that all waters within a line drawn from headland to headland are territorial. All that Stair says is, that bays, etc., are capable of being declared territorial. The doctrine of the king's chambers, which is the doctrine of Halleck, has been quite discredited, and is maintained by no other writer. In both the Conception Bay Case and the Bristol Channel Case, the court proceeded on a mixed view, partly of configuration and partly of history.

Argued for the respondent: 1. The statute authorizing the bye-law is clear and unambiguous in its terms, and applicable to British subjects and foreigners alike. It is not disputed that so far as municipal laws are concerned, foreigners outside British territory are, *prima facie*, excluded. But the criterion is: What mischief was the legislation aimed at remedying? Was the object of the statute to give foreigners a monopoly

of the fishing in the area? Or was it to safeguard the interests of the line fishermen and prevent destruction of the spawn? The object was for the benefit of foreigners as well as British subjects. (*Wilson v. McKenzie*, 1894, 23 R.J. 56; *The Queen v. Stewart* [1899], 1 Q. B. 964.) The words of the act are in terms of universal application. When legislation applies to an area specified and defined there is no presumption that foreigners are excluded. (*The Queen v. Keyn*, cit. per Cockburn, C.J., at 160.)

If the territory to which it applies is undoubtedly British, the presumption is equally strong if the territoriality is doubtful. It is only where the territory is undoubtedly not British that there is a presumption that only British subjects are included. The limits of the North Sea, as given in the convention, were only for the purposes of the convention, and these have nothing to do with the purposes of the herring fishery act of 1889. 2. The Moray Firth is part of the British territorial waters. What constitutes territorial waters is all within a line drawn from headland to headland. The only objection to the application of that rule here is that there is a very great amount of water included. But that is not a valid objection. (Halleck's International Law, vol. i, p. 165; Westlake's International Law, pp. 187, 188.) The only limitation on that assertion of right is that no more is to be claimed than is reasonably necessary for the protection of the country's interests. (Hansard, 3d series, vol. ccxxxvii, col. 1607, per Lord Cairns.) The *Franconia* Case was decided on a misapprehension. (*Orr Ewing's Trs. v. Orr Ewing*, 1885, 13 R. H. L. I, at p. 12; Bell's Pr., §639; Stair, II, i, 5; Ersk. II. i. 6.) In the schedule to the act there are other spaces of water included which would be outside territorial limit according to the appellants' contention. The question is one of fact, viz: are there headlands, is the area well defined, and is it bounded by the coasts of the country? If a bay twenty miles wide may be territorial, so may one eighty miles wide. (*Direct United States Cable Co. v. Anglo-American Telegraph Co.* cit. per Lord Blackburn, 421; *The Alleganean*, 32 Albany Law Journal, 484; 4 Moore's International Arbitration, p. 4333; Hall's International Law, p. 157.) There are no promontories or *fauces* in the Moray Firth other than those taken here. 3. Even if the Moray Firth is not for all purposes territorial, this country may make police regulations with regard to it in order to regulate the fishings. The long use of this firth by our line fishermen goes to show the interest of the country to make such regulations. (*The Queen v. Keyn*, cit. per Cockburn, C.J., at pp. 188, 189, 214, 216, 218; Hall's Foreign Jurisdiction of the British Crown, pp. 243, 245.) Such regulation has been made in the past. (Herring Fishery Act, 1808, 48 Geo. III., cap. 110.) Parliament

has in other cases legislated for foreigners in extra-territorial waters. (56 Geo.III. cap. 23, §4 [Act for policing St. Helena when Napoleon was a prisoner]; Quarantine Act; 6 Geo. IV. cap. 78, §7, 8; Hardcastle on Statutory Law, p. 412, referring to *M'Leod v. Attorney General for New South Wales*, 1891, A. C. 455, at p. 458; Foreign Jurisdiction Act, 1890, 53 and 54 Vict. cap. 37, §14.)

The court answered both questions in the affirmative and dismissed the appeal.

The Lord Justice General: The facts of this case are that the appellant being a foreign subject, and master of a vessel registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rat-tray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the sheriff court at Dornoch to answer to a complaint against him for having contravened the seventh section of the herring fishery act, 1889, and the bye-law of the fishery board, thereunder made, and was convicted.

It is not disputed that if the appellant had been a British subject in a British ship he would have been rightly convicted. Further, in the case of *Peters v. Olsen*, when the person convicted, as here, was a foreigner in a foreign ship, the conviction was held good. The only difference in the facts in that case was that the locus there, was upon a certain view of the evidence, within three miles of a line measured across the mouth of a bay, where the bay was not more than ten miles wide, which cannot be said here. But the conviction proceeded on no such consideration, but simply on the fact that the locus was within the limit expressly defined by the schedule of the sixth section of the herring fishery act; and the three learned judges in that case did, I think, undoubtedly consider and decide the question, whether the sixth section of the herring fishery act (which in this intention is the same as the seventh) was, or was not, intended to strike at foreigners as well as British subjects. But as this is a full bench, we are at liberty to reconsider that decision.

My lords, I apprehend that the question is one of construction and of construction only. In this court we have nothing to do with the question of whether the legislature has, or has not done, what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an act of parliament duly passed by lords and commons and assented to by the king, is supreme, and we are bound to give effect to its

terms. The counsel for the appellant advanced the proposition that statutes creating offenses must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibitions here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," etc., "Every person who," etc.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whomsoever were not affected by the enactment. It is obvious that the latter consideration applied in the present case. Whatever may be the views of any one as to the propriety or expediency of stopping trawling, the enactment shews on the face of it that it contemplates such stopping; and it would be most clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that international law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the king's subjects.

It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland. Now can it be said to be clear by the law of Scotland that the locus here is beyond what the legislature may assert right to affect by legislation

against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The locus, although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

(1) The dicta of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus, Stair, II, i, 5:

The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is inclosed in bays, creeks, or otherwise is capable of any bounds or *meihs* as within the points of such lands, or within the view of such shores, then it may become proper, but with the reservation of passage for commerce as in the land.

And Bell, Pr. §639:

The sovereign * * * is proprietor of the narrow seas within cannon shot of the land, and the *firths*, gulfs, and bays around the kingdom.

(2) The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to §6, many places will be found far beyond the three-mile limit, *e.g.*, the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

(3) There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted.

They will be found collected in the case of the Direct United States Cable Company v. Anglo-American Telegraph Company, L. R. 2 App. Cas. 394, the bay there in question being Conception Bay, which has a width at the mouth of rather more than twenty miles.

It seems to me, therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his pro-

position that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction make me think that it did so legislate.

An argument was based on the terms of the North Sea convention—which had been concluded a few years before this act was passed, and which defines “exclusive fishery limits” in a manner which excludes this part of the Moray Firth. But I do not think any argument can be drawn from that definition, for the simple reason that the convention as a whole does not deal with the subject-matter here in question, viz: mode of fishing.

If it had been attempted to infer from the terms of the act a prohibition of which the effect was to give to subjects and deny to foreigners the right to fish, then the convention might be apt to suggest an argument against such a construction. But that is not so. Subjects and foreigners are *ex hypothesi* in this matter treated alike.

I am therefore of opinion that the conviction was right; that both questions should be answered in the affirmative, and that the appeal should be dismissed.

Lord Kyllachy: This appeal is directed against a conviction of the appellant—who is a foreigner—of having contravened a certain bye-law of the Scottish fishery board, made, it is not disputed, with the authority and in terms of a certain section of the herring fishery (Scotland) act of 1889.

The statute in question enacts (§7):

The fishery board may by bye-law or bye-laws direct that the methods of fishing, known as beam trawling and otter trawling, shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Head in Aberdeenshire, in any area or areas to be defined in said bye-law.

The bye-law in question (No. 10) enacts, *inter alia*, that the foregoing provision shall apply to the whole area specified in the statute. It also provides penalties for contraventions of the enactment.

It is not disputed that, if this statutory enactment falls, on its just construction, to be read literally and without qualification, the appellant was rightly convicted. This court is, of course, not entitled to canvass the power of the legislature to make the enactment. The only question open is as to its just construction. Nor can there be any doubt as to that construction if the language is to be read literally, or on ordinary principles of construction, and apart from implications sought to be deduced from outside.

The appellant, however, contends that the statute cannot be read literally, but must be read with reference to certain alleged rules of international law; and that in that view it does not, on its just construction, apply, *as regards foreigners*, to such part of the area specified, as, according to international law, lies outside the territory or at least the territorial jurisdiction of the British crown. He further contends that the larger part of the area specified, including the part in which his alleged offence was committed, is, on the principles of international law, outside the said limits.

Now, dealing first with the point of construction—the question as to what the statutory enactment means—it may probably be conceded that there is always a certain presumption against the legislature of a country asserting or assuming the existence of a territorial jurisdiction going clearly beyond limits established by the common consent of nations—that is to say, by international law. Such assertion or assumption is, of course, not impossible. The legislature of a country is not *quoad hoc* quite in the same position as its courts of law exercising, or claiming to exercise, a jurisdiction *ex proprio motu*. A legislature may quite conceivably, by oversight or even design, exceed what an international tribunal (if such existed) might hold to be its international rights. Still, there is always a presumption against its intending to do so. I think that is acknowledged. But then it is only a presumption; and, as such, it must always give way to the language used if it is clear, and also to all counter presumptions which may legitimately be had in view in determining, on ordinary principles, the true meaning and intent of the legislation. Express words will, of course, be conclusive; and so also will plain implication.

Now it must, I think, be conceded that the language of the enactment here in question is fairly express—express, that is to say, to the effect of making an unlimited and unqualified prohibition, applying to the whole area specified, and affecting everybody—whether British subjects or foreigners. The primary enactment, it will be observed, is directed, not against persons or classes of persons. It is directed against certain things—the commission of certain acts—within a precisely defined area. It contains no elastic expressions—no indefinite terms. It declares simply, that within a precisely defined area a certain method of fishing known as beam or otter trawling shall not be practised. That is the primary enactment; and its scope is not, I think, affected by the association of ancillary provisions for the enforcement of the prohibition by penalties. *Prima facie*, therefore, it seems difficult to read such an enactment otherwise than as expressly providing that in no part of the

area mentioned shall the method of fishing in question be practised by anybody. Any other meaning can only be reached by the interpolation of words which are not used, and which, if interpolated, would materially alter the sense. And no case has yet occurred—certainly none has been cited—where the presumption on which the appellant founds had been held adequate to limit or qualify the terms of an enactment thus definite—expressed in quite definite language—and applied to a quite definite area.

The difficulty, however, of the appellant's construction—the difficulty, that is to say, of applying his presumption—is accentuated by several other considerations.

In the first place, the scheme and object of the enactment have to be considered. Plainly, that object was to protect the area—the whole area in question—as against a mode of fishing assumed to be injurious. And it need hardly be said that that object would not be attained, but would, on the contrary, be frustrated, by a construction of the enactment which, while it restrained British subjects from trawling within any part of the protected area, yet permitted foreigners to trawl as they pleased over the greater part of it. It is plain that under such conditions the mischief to be redressed would not be redressed, but might even be aggravated. Accordingly, it would be, I think, easier to suppose that the legislature had reached even an erroneous conclusion as to the extent of its jurisdiction, and had legislated accordingly, than that it had resolved deliberately to impose a futile restriction upon its own countrymen, and at the same time to create a hurtful monopoly in favour of foreigners. It would also, I think, be easier to accept almost any reasonable alternative, than to assume that the legislature contemplated a practically unworkable enactment—an enactment which would, in every prosecution under it, leave the issue to depend upon the result of an investigation by the local judge, of perhaps large and difficult questions of international law.

These are, it seems to me, at least serious difficulties in the way of reading into this statute and bye-law qualifying words which are not expressed. And other difficulties might, I think, be figured. But assuming all these to be overcome, one conclusive consideration I venture to think remains, viz: this, that the presumption on which the appellant founds has never, so far as known, been applied or proposed to be applied except where the excess of jurisdiction was clear. In other words, the whole ratio of the presumption fails if it appears that the area which is in controversy, is at best only in the position of debatable ground; being in fact within a category as to which different nations

have always taken more or less different views, and maintained different contentions.

This last observation, however, involves the consideration, not substantively, but as bearing on the point of construction, of the appellant's second proposition which, as I understand it, is really this—that outside of the line where the protected area—that is to say the Moray Firth narrows to a width of ten (or perhaps rather thirteen) miles—its whole waters are simply parts of the open sea—being so (1) according to established rules of international law, and (2) according to alleged special rules applicable, as it is said, to the Moray Firth, introduced by the North Sea convention of 1883, as scheduled to the sea fisheries act of that year. And if all this were made out, I acknowledge that on the point of construction the appellant would have a perhaps formidable case.

It, however, seems to me vain to suggest that according to international law there is *any part* of the Moray Firth which is simply an area of open sea, and thus in the same position as if it were situated, say, in the middle of the German Ocean. For *prima facie*, at least, the whole Firth, is, as its name bears, a "bay" or "estuary," formed by two well-marked headlands, and stretching inwards for many miles into the heart of the country. All that can be said *contra* is only this—that at its outer end the Firth is very wide, and is of a size, if not also of a configuration, somewhat beyond what is usually characteristic of bays and estuaries. That may or may not be so. The cases of the Bristol Channel, the Firth of Clyde, and the Firth of Forth, would have to be considered before that proposition could be affirmed. But, be that as it may, the real question I apprehend is—whether, by international law, there is any recognized and established rule on the subject, particularly a rule so arbitrary and artificial as that of the ten-mile measure, for which the appellant contends.

Now as to that, it is, I think, enough to say that no such rule exists, or (which is the same thing), that we have not had presented to us any evidence of its existence. But I may add that, if negative authority may be invoked, there seems to me to be no better authority as to the existing position, than the passage quoted at the discussion from Lord Blackburn's—or rather the Privy Council's—judgment in the Conception Bay Case (*Direct United States Cable Co. v. Anglo-American Telegraph Co.*, L. R., 2 App. Cas. 420), in which, after reviewing existing authorities, their lordships sum up the result thus:

It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state

possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination.

It seems difficult in face of this (the, I think, latest deliverance on the subject) to affirm that the statute and bye-law here in question are (if construed in their natural sense), in breach of plain and established rules of international law.

It remains, however, to consider as to the supposed bearing of the convention of 1883. And no doubt, if the question were one of *exclusive fishing privileges*, the convention might have an important bearing. For it defines, quite in terms of the appellant's contention, the extent to which, *inter alia*, in the Moray Firth, British subjects shall have the exclusive right of fishing. But exclusive fishing privileges—or, at all events, exclusive fishing privileges as defined by convention—are one thing. Territorial jurisdiction, proprietary or protective, is a different thing. And, as I read the convention of 1883, it is only with respect to exclusive fishing privileges that its terms and provisions have any relevancy. There is certainly nothing in the convention, at least nothing was brought under our notice, which in the least conflicts with the right of the several contracting nations to impose, each of them within its territorial limits (whatever these are), restrictions universally applicable against injurious practices or modes of fishing, such as are by this statute and bye-law imposed here. In other words, there is nothing in the statute and bye-law in question which at all interferes with the exclusive fishing privileges of the several nations. I cannot assent to the argument, that the convention really introduces a new chapter into general international law—a chapter establishing, with respect to the definition of bays and estuaries, or at all events bays and estuaries off the North Sea, new and artificial rules. That appears to me to be a somewhat extreme proposition. I may add that I have not found it necessary to consider the effect of the appellant's vessel belonging to Norway—a country which was not a party to the convention, and had probably good reasons for not being so. I assume, for the purposes of our judgment, that the appellant is in no worse position than if he had been the master of a German or Danish fishing vessel.

The result on the whole, therefore, is that without deciding substantively whether or not the whole area of the Moray Firth would or should be recognised by an international tribunal (if such existed), as within the jurisdiction of the British crown, I am prepared to consider myself bound to hold—what is sufficient to support this conviction—that upon its just construction the act of 1889 asserts the existence, for the pro-

tective purposes to which it relates, of the jurisdiction in question—and that that is enough for us sitting here as one of his majesty's courts.

Lord Johnston: The offence charged is created by the herring fishery (Scotland) act, 1889, §7, which empowers the fishery board by bye-law to direct that beam trawling shall not be used in the Moray Firth within a line drawn from Duncansby Head to Rattray Point, and imposes penalties, superseded by those of the act 1895, §10 (4) and (5), on any person contravening such bye-law.

The enactment is not operative till the fishery board speaks by its bye-law. This it did in 1892.

The question raised by this appeal is, did the legislature intend the above enactment to be of universal application, or to be confined in its prohibition and its penalties to British fishermen? The language is absolute and general. But notwithstanding this absoluteness and generality, it would, I think, have been necessary to determine some of the larger questions of international law with which Lord Kyllachy has dealt, were it not for the following considerations, viz: first, that the enactment and its relative bye-law are no assertion of exclusive right of fishing, but only of right of regulation of fisheries. But, second, and more particularly, that the course of Scottish fishery legislation leads to a conclusion which precludes those wider questions above referred to.

I find that parliament, before the union and since, has been in use to provide for the regulation of fisheries round the coasts of Scotland, without confining itself to territorial waters in the narrower significance.

For instance, before the union, the act of Anne, 1705, cap. 48, was passed for the advancement and establishment of the fishing trade in and about the kingdom, and authorised her majesty's subjects to take herring and white fish in all and sundry seas, channels, bays, etc., of this kingdom, "wheresoever herring or white fish may be taken," and then proceeds to protect and regulate their trade.

The treaty of union itself, §15, provided for the application of a portion of the "equivalent" to encouraging and promoting the fisheries of Scotland. This grant permitted the first establishment in 1727, by 13 Geo. I. cap. 30, of the board of commissioners, which, after various changes in its constitution, was in 1883 superseded by the present fishery board.

A survey of the acts between 1727 and 1882, and they are numerous, discloses that the functions of these commissioners and their officers were not confined to inshore or strictly territorial waters. And it is consistent with the prior history of the matter, that in 1882, by the Act 45 and 46 Vict. cap. 78, §5, the present fishery board, having had con-

ferred on them the whole powers and duties of the former board of British white herring fishery, are directed to "take cognisance of everything relating to the coast and deep sea fisheries of Scotland," and to "take such measures for their improvement" as the funds under their administration may admit of.

When I read the enactment under consideration in the light of previous legislation, I have no doubt that the legislature intended it to be of general application. I, therefore, agree in the conclusion at which your lordships have arrived.

Lord Salvesen: The facts of this case have been already fully narrated. I note, however, that the appellant does not found on his nationality as a Dane. The preliminary objection which he stated to the jurisdiction of Dornoch sheriff court, was on the footing that he was the foreign master of a steam trawler registered in Norway; and his counsel admitted that his case falls to be treated as if his own nationality had been the same as that of the ship he commanded.

It was conceded for the crown, and I think rightly, that if an offence is created by a statute of the British parliament, it will, in the ordinary case, be presumed to have no application beyond territorial waters. But as this presumption must yield to an express clause, that the act shall apply to foreigners and British subjects alike; so I think it will yield to a clear implication to the like effect. Where a British statute prohibits a certain thing to be done within a definite geographical area, it seems to me that there is no presumption that such a prohibition shall be confined only to British subjects. Still more, if, on examining the subject-matter of the prohibition, it is found that it will be futile or ineffectual unless its operation is general, then I think its generality is not capable of any limitation in favour of persons who do not ordinarily owe obedience to the British parliament. These considerations are applicable to the present case. The statutes and bye-laws contravened have, for their objects, the protection of line fishermen, and the preservation of the spawning beds of fish in the interests or supposed interests of the whole fishing community. If they were to be construed as impliedly excepting from their scope all foreigners fishing from foreign vessels, such a construction would not merely defeat the object of the legislature, but would confer a privilege upon foreigners which was denied to British subjects. It can scarcely be supposed that a British parliament should pass legislation which would neither have the effect of protecting line fishermen from the competition of trawlers, nor of preserving the spawning beds, but would simply place British subjects under a disability which did not extend to foreigners—in other words, create in favour of

foreigners a monopoly of trawl fishing in the Moray Firth. I think it was a just observation of the solicitor general that, if legislation of this nature had been proposed, and the words inserted which the dean of faculty maintained were implied, it would never have been submitted by a responsible minister, or have received the approval of parliament.

The view which I have expressed is strengthened by a consideration of the area within which the operation of the bye-law is confined. The stretch of water known as the Moray Firth, and defined by the bye-law, is undoubtedly geographically *inter fauces terræ*; and there are many examples of states asserting exclusive jurisdiction within such areas, and of such assertion being acquiesced in by other nations. In these circumstances I think the act, under the authority of which the bye-law in question was passed, must be treated as an assertion by the British parliament of their right to regulate the fishing in this area, and to treat it as within the territory over which the jurisdiction of the Scottish courts extends. The right so claimed may or may not be conceded by other powers, but that is a matter with which this court has no concern. We were told that the result of upholding the conviction would be to provoke reprisals by other powers. If so, that is a matter for the foreign office. But it is difficult to suppose that foreign nations should object to a regulation designed for the protection of fisheries in which they all share, and which confers no exclusive privileges on British subjects.

Perhaps the strongest point urged by the appellant was that based upon the sea fisheries convention of 1883, where the exclusive privileges of the fishermen-subjects of the high contracting parties were geographically defined; and it was said that it can never be assumed that parliament would legislate in violation of a treaty with foreign powers. If it were clear that the act of 1889, as now construed, is in direct violation of the convention, the argument would be of the greatest weight. But I find no sufficient reason for holding that a regulation which confers no exclusive fishing rights on British subjects is inconsistent with the convention. Moreover, in my opinion, the appellant cannot found upon the convention as conferring upon him any treaty rights. It was said that the convention might nevertheless be treated as evidence, and it was even contended as conclusive evidence of the limits of the claim over territorial waters which this country maintains. I do not think so. I see no reason why, even if Great Britain's territorial rights were limited, as by contract in a question with certain powers, she should not assert, as against Norway, rights of a much more extensive nature. On these grounds I have come to the conclusion that the sheriff court of Dornoch

had jurisdiction to try the offence charged, and that the conviction must therefore stand.

The Lord Justice-Clerk, Lord M'Laren, Lord Stormonth-Darling, Lord Low, Lord Pearson, Lord Ardwall, Lord Dundas and Lord Mackenzie concurred. Nineteenth July, 1906.

Counsel for Appellant, Dean of Faculty (Campbell, K. C.), Macmillan; Agents, Alex. Morison & Co., W. S.—Counsel for Respondent, Solicitor General (Ure, K.C.), T. B. Morison, Munro; Agent, W. S. Haldane, W.S.. Crown Agent.

BOOK REVIEWS: BOOK NOTES

Les Sanctions de L'Arbitrage International. Par Jacques Dumas, Docteur In Droit, Procureur de la Republique à Rethel. Avec une préface de M. D'Estournelles de Constant, 1906, Sénateur, Président du Groupe Parlementaire de L'Arbitrage International. Paris. A. Pedone.

There are abundant evidences in the remains of ancient Greek and Roman literature that the resort to arbitration was practiced not only for the settlement of disputes between private parties but also between states.

Under the Roman rule, the mediation or arbitration of the senate or of popular leaders, like Pompey, was sometimes invoked by and between differing states, princes and leaders of contending factions. But these arbitrations, which were generally conducted with the semblance of fairness, were often treated and used, as convenient political agencies, to strengthen the hand of the dominant power.

There are numerous instances of the resort to arbitration during the middle ages, for the settlement of such differences, but they were mostly between petty princes and states and of a minor character. In the following ages the recourse to arbitration grew less frequent.

Francis the First and the Swiss Cantons, in the sixteenth century, set the first example in modern times of a permanent treaty of arbitration. In the seventeenth century, Oliver Cromwell, so fortunate in all the incidents and accidents of his career, in the association of his name with reforms of a great and permanent character, made a treaty with the states of the Netherlands, which provided for a fair and friendly arbitration of differences between those states and the commonwealth.

But it was reserved for the nineteenth century rapidly to develop into what may now justly be called a usage of nations—since it received the sanction of an international treaty in 1899—the resort to arbitration in many cases of a nature that in former times could only have been solved by the sword. At the same time there has been manifested a marked tendency towards the creation of arbitral tribunals of a more severely judicial character and the assimilation of their procedure to that of the civil courts. The improvement in the methods, and the extension of the practice have corresponded to the broader, more just and enlightened ideas of our advancing civilization.

But the vital principles remain the same; and the problems which have been awaiting solution continue to tax the ingenuity of statesmen and jurists who have aspired to secure the same impartial justice in the determination of disputes between states, as between private parties.

Among those problems, more or less real or imaginary, the want of a formal sanction for the sentences of arbitral tribunals continues to be agitated, even though numerous instances of the voluntary execution of arbitral awards by the losing parties during the last century, have demonstrated the needlessness of formal penalties to secure their performance.

For, a new force has entered into the domain of international politics and has furnished an all-sufficient guaranty of the voluntary discharge of arbitral awards; a power more imposing in its collected influence than fines, imprisonments, interdicts, or blockades, visited by offended upon offending states. The national humiliation and the political and commercial inconveniences and prejudices which a nation must suffer, if it disregards its plighted faith and its solemn international obligations, are so incalculable and injurious that no enlightened government can long fail to observe them.

Monsieur Dumas, in an octavo volume of over four hundred pages, has made an elaborate study of the subject. He gives a lucid and elegant historical sketch of the theory and practice of sanctions, beginning with the Amphictyonic Council and coming down to the present day. He considers them in their various aspects, as moral, material, civil, penal and political. Among the moral sanctions, he classes excommunications and the oath, public opinion and the plighted word; and among the material sanctions those known to public law as retorsion and reprisals, the pacific blockade, siege and war. Among the civil sanctions are the seizure of property, movable and immovable, sureties, hostages, pledges and mortgages. Thus far, Monsieur Dumas treats of certain definite and well known sanctions which have been tried. But public opinion, the author justly says, is

the judge of justice and the most efficient sanction of arbitration.

Public opinion is in turn safe-guarded against its own caprices and errors by the principle of liberty, freedom of speech, of the press, of association, of assembly and petition. Such are the sources, the agency and effects of public opinion, characterized by Monsieur Léon Bourgeois

as a new power; that of universal conscience which draws its inspiration from the essential principles of morality and of law, in whose stability and force it shares and to which it owes its constant and beneficent action.

The analysis of the nature, operation and influence of public opinion is admirable, but it is to be regretted that the author took occasion to exploit a conspicuous weakness of the French national character, in the treatment of so broad a topic as international arbitration. It hardly seems necessary again to remind the world of the moral superiority of the French over all other people; a task which has already been done so completely by Messieurs Guizot, Hugo, and other distinguished Frenchmen of letters. According to Monsieur Dumas

"the national opinion of the English suffered an aberration during the sombre epoch of the war of the Transvaal; and the United States suffered the same syncope in the affairs of Cuba and the Philippines. Afterwards was seen that of Japan in a paroxysm of madness. But in all these circumstances, was international opinion ever at fault for a single moment? There were diverse sympathies but only a single judgment. International opinion was right but it erred in not acting, because it did not know how to act." But he adds "international opinion will some day be able to act. Have we not had a proof of it in the Dreyfus affair.

"This voice of international opinion was heard, comprehended and believed in France; and it will be, before history, one of the grandest honors of France that she was able to respond so promptly to the appeals of reason and justice. Neither England nor the United States, in similar circumstances, would have been able to reconquer so soon by an act of political probity the esteem and confidence of the universe. France alone has hitherto had this merit."

The author might well have added that neither in Great Britain nor in United States could the Dreyfus affair have occurred. His excellent work would certainly have lost nothing in dignity by the omission of all invidious allusions either to Great Britain, Japan or the United States. They were hardly to be expected in a work, dedicated to the author of the second Hague conference who, on the grounds of humanity, was one of the earliest and most ardent advocates of the intervention in Cuba; in a work, professing to treat of a question of exclusively international interest. These instances, as given by the author, could not illustrate and enforce the theme, inasmuch as they contain assumptions of fact not generally accepted and which involve a consideration of motives, antecedent and concurrent facts and circumstances and results, before final judgment could safely be pronounced. Are the people of Cuba better governed, more free, more prosperous, and happy under the present régime than they were under the ancient?

We are too near these events to presume to declare what will be the impartial and colorless judgment which will be finally rendered by the international tribunal of public opinion. But a very just and striking instance is given by the author of the persistent and disastrous effects of public opinion on the fortunes of any nation which has greatly erred through the lust of conquest and martial glory.

States are less assured of impunity than the individual for they endure long enough to suffer the consequences of their acts. Thiers asked, after September 4, 1870, upon whom the Germans were making war, since the empire no longer existed. Ranke answered "upon Louis XIV." and he might have added "and Napoleon First."

The author could not resist the temptation to add,

There is more than one chance that Germany will expiate some day her violences of 1870 as cruelly as France has expiated the mistakes of her former governments.

Monsieur Dumas has pointed out the inadequate and unsatisfactory nature of the other sanctions mentioned; and he has at the same time well vindicated the competency of public opinion to sanction the performance of arbitral awards; but the aspiration for

another voice than that of the press and parliaments for the expression of international opinion

could hardly be satisfied by an international "college of censors," created as an official organ of that opinion for, as the author justly says,

it would be illusory to confide to governments the exercise of censorship.

The author finally leaves the subject, after much learned and interesting discussion, where he found it. No method is proposed, no suggestion is offered of the solution of the question of an official organ for the authoritative expression of the opinion of the civilized world. It is to be doubted whether that opinion will not remain more powerful, more efficient and cogent in its unorganized condition as it gathers from the four quarters of the globe and pours out its storm upon a government which engages in any war, avoidable by arbitration, or which fails to observe the sentence of the tribunal.

Notwithstanding the introduction of topics of a polemical nature and the occasional want of breadth and elevation of treatment of the subject, the work of Monsieur Dumas is an instructive and original contribution to the subject of which he treats. It amply vindicates the opinion expressed in the preface by Baron D'Estournelles that,

it is opinion that has led governments to accept the resort to arbitration; it is opinion which will oblige them to execute the arbitral sentences voluntarily invoked by them.

W. L. PENFIELD.

Report on the Subject of Citizenship, Expatriation, and Protection Abroad.

By Mr. James B. Scott, Solicitor for the Department of State, Mr. David Jayne Hill, Minister of the United States to the Netherlands, and Mr. Gaillard Hunt, Chief of the Passport Bureau. Accompanying the Letter of the Secretary of State to the Speaker of the House of Representatives, December 18, 1906. Pp. 35, with appendices, 538. Government Printing Office. 1906. H. of R. Doc. No. 326, 59th Congress, Second Session.

Pursuant to the recommendation of the committee on foreign affairs of the house of representatives (Report no. 4784, 59th Congress, First session) Acting Secretary of State Bacon, on July 3, 1906, constituted a board to inquire into the laws and practices regarding citizenship, expatriation, and protection abroad, and to report recommendations for legislation to be laid before congress.

The personnel of the board constituted by the acting secretary of state, viz: Mr. James Brown Scott, solicitor for the department of state, Dr. David Jayne Hill, American minister at the Hague, and Mr. Gaillard Hunt, chief of the passport bureau, all gentlemen of practical experience in dealing with questions relating to citizenship, and each having had, from his position, to study such questions from a different view point, was a guaranty that the investigation would be conducted along practical lines. The result of their examination, which is embodied in a report and recommendations covering thirty-five pages, and appendices of five hundred pages, is an exceedingly valuable contribution to the literature relating to the important subject of citizenship; and nearly all of the recommendations made by the board were carried into effect by legislation enacted by the congress that has just adjourned. Secretary Root, in transmitting the report and recommendations to Speaker Cannon, commended it

as a very clear and thorough exposition of this most important subject, upon which it seems to be generally agreed legislation is much needed.

The first appendix consists of a thorough memorandum or digest of cases relating to citizenship of the United States. The classification adopted is the logical one of citizenship by birth, citizenship by naturalization, and loss of citizenship by expatriation or otherwise. Under the head of Citizenship by Birth, the subject is considered under the subheads of Children Born within the Territory of the United States, and Children Born Abroad. Under the subhead of Children Born within the Territory of the United States, there is a further subdivision of Inhabitants not Aliens: A, Indians; B, Africans; C, Mixed Races; D, Porto

Ricans and Filipinos. The source from which the great bulk of our native citizenship is obtained, viz: children born in the United States of parents who are citizens, is not mentioned, perhaps because of the fact that the citizenship of such persons is obvious. Under the subdivision of Alien Inhabitants, the subject is considered under the branches: A, of Parents Who May Become Citizens; B, of Parents Who May Not Become Citizens, and C, Election of Citizenship, and there is quite a full discussion of the imperfectly understood doctrine of election. It may be observed that it appears to be well settled under our law that citizenship is conferred by the mere fact of birth in the United States, irrespective of the nationality of the parents and whether the parents, if aliens, may or may not themselves become citizens by naturalization.

The citizenship of children born abroad is discussed in the memorandum under the heads of: American Parents Permanently Residing Abroad; A, Of Native Americans; B, Of Naturalized Americans; Of Americans Temporarily Residing Abroad; A, Of Native Americans, B, Of Naturalized Americans; and C, Election of Citizenship.

There is a full consideration of naturalization, under the following heads: Naturalization in Accordance with General Laws, Naturalization by Naturalization of Parent, Naturalization by Virtue of Marriage Relationship, Collective Naturalization (by admission of a new state into the Union by treaty, and by conquest). This memorandum in relation to naturalization constitutes an exhaustive digest of the judicial decisions on the subject and shows an immense amount of research.

The subject of expatriation is quite fully treated from a legal standpoint, and the memorandum is followed by the text of the laws of the United States on the subject of citizenship, from the beginning of our government, by a discussion of extraterritoriality, extracts from treaties with countries in which the United States exercises extraterritorial jurisdiction, consular court regulation, and a table of cases cited in the appendix.

Appendix II consists of a short memorandum on citizenship of states of the Union, with the pertinent statutes of different states as an exhibit.

Appendix III embodies the laws of foreign countries in relation to citizenship, expatriation and protection.

Throughout the memorandum, with one or two slight exceptions, there are no quotations from the opinions of secretaries of state, a fruitful source of authorities on most of the subjects considered. It is presumed that the reason for this was the desire of the members of the board to base their recommendations exclusively upon *judicial* decisions.

The authorities here referred to may be found collected and classified in John Bassett Moore's monumental work, the *International Law Digest*.

The recommendations made by the board, in brief, were that laws be enacted declaring:

1. That an American woman who marries a foreigner shall take the nationality of her husband. Upon termination of the marital relation, she may revert to her American citizenship, if abroad, by registering within one year as an American citizen at an American consulate or by returning to reside in the United States; if she is in the United States, by continuing to reside therein. (This was substantially the law of citizenship of married women, as declared and administered by the department of state, at the date of the preparation of the memorandum, but as there were decisions of our courts both for and against the view that the marriage of an American woman to a foreigner conferred on her the nationality of her husband; and as the proposition that upon the termination of the marriage relation, her American nationality reverted, did not square with the proposition that when a citizen becomes an alien, he can recover his rights as a citizen, only by going through the forms which our laws prescribe for the naturalization of aliens; it was very desirable that the question should be definitely solved by statute.) The act of March 2, 1907, substantially enacts into law this recommendation.

2. That a foreign woman who acquires American citizenship by marriage to an American, shall be assumed to retain the same after termination of the marital relation, if she continues to reside in the United States, unless she makes formal renunciation of such citizenship before a court having jurisdiction to naturalize aliens; and if she proceeds abroad she may continue her American citizenship by registering, within one year, as an American citizen, before the most convenient American consulate. (While the practice of the department of state had been to regard as a citizen of the United States, after the termination of the marriage, an alien woman married to a citizen, there was no mode of renunciation of citizenship prescribed, and it was difficult to determine at what period she ceased to be entitled to protection as a citizen of the United States in the event of her proceeding abroad and taking up her residence there upon widowhood. A good result is accomplished by the enactment of the law (§4 of act of March 2, 1907) which follows the wording of the recommendation of the board, except that for the last clause is substituted the following:

or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

3. That a non-resident child born without the United States of alien and non-resident parents shall be deemed a citizen of the United States by virtue of the naturalization of the parent; provided, however, that such naturalization takes place during the minority of such child, and provided, further, that the citizenship of such minor child shall date from the entry of such minor into the United States permanently to reside therein. The phrase "dwelling in the United States" in §2172 of the Revised Statutes, has been so variously construed by the courts and secretaries of state, that legislation was essential to determine the intent of the framers of the law. The substantial recommendation of the board is embodied in §5 of the act of March 2, 1907, which reads as follows:

That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: provided, that such naturalization or resumption takes place during the minority of such child; and provided, further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

4. That an American citizen may be assumed to have expatriated himself: (1) When he obtains naturalization in a foreign state. (2) When he engages in the service of a foreign state and such service involves the taking of an oath of allegiance to such state. (3) When he becomes domiciled in a foreign state, and such domicile shall be assumed when he has resided in a foreign state for five years without intent to return to the United States; but an American citizen residing in a foreign state may overcome the presumption of expatriation by competent evidence produced to a diplomatic or consular officer of the United States under such rules and regulations as the president shall prescribe. That any person who shall have accomplished expatriation in the manner above set forth shall, in order to reacquire American citizenship, be required to comply with the laws applicable to the naturalization of aliens. And the exercise of the right of an American citizen to expatriate himself shall only be permitted or recognized in time of peace. The act of March 2, 1907, §2, while using briefer phraseology, comprehends the essential features of the board's recommendation. Its language is:

Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen and the place of his general abode shall be deemed to be his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or

consular officer of the United States, under such rules and regulations as the department of state shall prescribe: and provided also, that no American citizen shall be allowed to expatriate himself when this country is at war.

5. That every male child being an American citizen resident abroad who desires to enjoy the protection of this government be required upon reaching the age of eighteen years to record at the most convenient American consulate his intention to become a resident and remain a citizen of the United States, and to take the oath of allegiance upon attaining his majority; and that an American citizen residing continuously outside of the United States for more than one year be required to register in a similar manner, at least once each year, his name and place of residence, date and place of birth, nationality of parents, occupation, and last place of residence in the United States, and to give solemn assurance of his continued allegiance to the United States and of his intention to return thereto. Section 6 of the act of March 2, 1907, passed in pursuance of this recommendation, provides:

That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of §1993 of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

It will be noticed that the application of this provision of the law is confined to children born outside the United States, thus showing that congress intended to differentiate, in this respect, between those born abroad and those born in the United States.

6. That the secretary of state be authorized, under such rules and regulations as the president shall prescribe, to extend the protection of this government and to issue qualified passports to those who, have made the declaration of intention to become citizens of the United States in accordance with the requirements of the act approved June 29, 1906, and who go abroad for brief sojourn, such protection and passports not to be effective in the country of the origin of the declarants and not to be granted to those who have resided in the United States for a period of less than three years. This recommendation was enacted into law (§1, act of March 2, 1907), in this language:

The secretary of state shall be authorized in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become a citizen of the United States as provided by law and has resided in the United States for three years, a passport may be issued

to him entitling him to the protection of the government in any foreign country: provided, that such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

This provision, qualified and limited, as it is, may serve a useful purpose. The only question that could properly be raised with reference to it, is as to the right of this government to intervene to protect, in a country not of declarant's origin, one who is not a citizen of the United States.

The recommendation of the board that the secretary of state be authorized to issue certificates of nativity to natural-born citizens of the United States, temporarily resident abroad, or who intend temporarily to reside abroad for legitimate purposes, setting forth the place of their origin, date of birth, and place of permanent residence in the United States, which was designed to meet an actual local requirement for purposes of identification, failed of enactment into law.

The further recommendations that, in order to prevent abuse of American passports in foreign countries, it be ordered that in future all passports shall be issued only by the department of state, to be valid for two years, and subject to a single extension for a like additional period by diplomatic and certain consular officers of the United States; and that the diplomatic officers of the United States be instructed to open negotiations with the governments to which they are accredited, extending and perfecting the treaty relations of the United States with respect to the rights of Americans, in order to secure to our citizens rights and privileges in accordance with the recommendations of the board; will, it is understood, be carried into effect by executive action.

The report of this board, remarkable both on account of its comprehensiveness and the fact that so many of its recommendations were so soon written into law, is highly creditable alike to the able gentlemen who were responsible for its preparation, and to the department under which they serve.

FREDERICK VAN DYNE.

Die Kodifikation des Automobilrechts. By Dr. Fr. Meili, Professor in the University of Zurich. Vienna; Mansche Hof-Verlags. iv, pp. 188. 1907.

Automobile Regulations of France and Other Countries. By H. Cleveland Coxe, Deputy Consul General of the United States at Paris. Paris and New York: Bretano. pp. 82. 1906.

Mr. Coxe, in his useful and carefully prepared book, happily applies the adjective "nomadic" to that new vehicle which we, in common with the greater part of the world, call the "automobile." The appearance on the highways of the world of this mechanical nomad, which will in all likelihood have crossed the border from another state or nation a few hours previously and whose occupants may be foreigners bound for some distant state or nation, raises questions concerning the need of uniformity in the rules governing highway traffic analogous to those which arise out of sea traffic. Consequently, Mr. Coxe finds it necessary to include the automobile regulations of other countries along with those of France. The British royal commission on motor cars, which made its report in 1906, includes a survey of the automobile regulations of Europe, as a part of the basis of its recommendations; and Dr. Meili codifies all the existing regulations of this country and Europe (using Mr. X. T. Huddy's recent American book on *The Law of Automobiles* as his American source), and draws conclusions concerning the interstate and international action necessary to control this mechanical nomad and make it beneficent.

From the books above mentioned the following definition of an "automobile" in this technical sense—the nomadic automobile—may be derived: It is a machine which accomplishes locomotion on the land, by means of a power stored or generated within itself, without the aid of any structure attached to the land, and which is of such size, weight, resiliency and compactness as to be capable of carrying persons comfortably and things securely for long distances at high speed, without injury to persons, things, or road surfaces and without injury to itself, by means of a source of power universally and cheaply to be obtained and easily to be carried.

An examination of the documents referred to in the books above named, shows that automobile machines not conforming to these requirements tend more and more to be classified under special names other than "automobile." In Great Britain there appears to be a tendency to apply the term "motor car" solely to the nomadic automobile, although in existing legislation it has a wider sense.

All the writers in considering the question of regulation of automobiles,

necessarily treat of the prevention of injury by inspection of machinery and equipment, by examination of operators, and by passports, of civil remedies for injury to person or property, of criminal punishment for violation of law and of taxation. The codification made by Dr. Meili of existing regulations on all these subjects is very complete. At the end of his book, Dr. Meili takes up the international questions arising out of the nomadic character of the machine. His conclusions concerning the action necessary to be taken in the interests both of the automobilists and the public are as follows (pp. 183-185):

The action which is first and most urgently required is, to formulate a uniform law concerning the operation of automobiles, defining the rights and duties of public officials and private persons in this respect. Everywhere the public and the automobilists are alike interested in having that done which will render life and property secure, and it ought not to be impossible to bring about such action as is necessary to accomplish this object; that is, to agree concerning proper requirements concerning construction and equipment to be complied with before permission to operate the machine can be granted, concerning the rules of the road, concerning signs and signals and concerning the manner of ascertaining the qualifications of those who wish to operate automobiles. These are matters regarding which, diversity of regulation becomes more and more unendurable. On these subjects it is possible to develop a unity of sentiment, because necessity compels all the diversely affected interests to concur in these respects for the common safety, and because it is necessary that there should be an agreement in these respects in order that the automobile may perform beneficent functions to the community at large.

The second action necessary is to determine the status of the automobile in international law, as a basis for reasoning with respect to those matters which cannot now be agreed upon.

The third and final stage of the worry will consist in determining the juridical status of the automobile and the special duties and liabilities growing out of the ownership and operation of the machine. Local legislation will be ineffective until there is a general agreement on principles. The states and nations must unite on a standard of legislative action respecting automobiles as the only means of avoiding legislation founded on wholly diverse principles. In the nature of the case, there is no possibility of framing an automobile law from a strictly national standpoint.

Of the correctness of Dr. Meili's conclusions there can, it would seem, be no doubt. The possibility of there appearing at any time upon any highway in the world a powerful and rapidly moving vehicle owned and operated by persons foreign to the region, necessitates, for the safety of all concerned, a standard of safe construction and equipment for such vehicles, and a mutual understanding on the part of all concerned respecting rules of the road, signs and signals, so that all concerned may, in every emergency, have an instantaneous and almost instinctive perception of their respective rights and duties, and may act accordingly. Such uniform precautionary measures and such uniform rules and standards can of course only be established by interstate and interna-

tional agreements, which would however, in many cases require to be adopted or carried into effect by legislation.

ALPHEUS HENRY SNOW.

A History of Diplomacy in the International Development of Europe. By David Jayne Hill, LL.D. Vol. ii.

The Establishment of Territorial Sovereignty. With maps and tables. Longmans, Green & Co. 1907.

To judge a work fairly one must get the author's point of view. This is true in all art. We must stand with the artist and get a true understanding of the spiritual truth he intended to portray. One may differ with the principle, may deny the correctness of the conception, but it remains true that to be fair one must accept the theory of the author and then say whether in his work he has clearly and strongly presented and fairly attained his ideal. And so in estimating this literary work we take the author's standpoint, accept his statement of the task he set before himself, and try to determine whether the object has been attained.

Doctor Hill in his second volume of the History of European Diplomacy says that it is to be

an account of the political development of Europe regarded from the international point of view, in which the emphasis is laid upon diplomatic policy and action rather than upon military operations.

The reader is then warned to divest himself of the present day conception of diplomacy as having "the modern accessories of organized chancelleries and permanent missions," and look for the "essence of diplomacy as seen in the intellectual and spiritual forces represented in plans and and purposes and policies of nations," developed and made prevalent through the issue of all agencies, even armies and navies, to accomplish designed results. He deals with the psychological factors "in moments of creative action" and not with the mere history of military conflicts which may or may not have been the agencies employed to bring about the result intended by men of great spiritual force. These men, who were real diplomatists, did not, perhaps, wear the straps and spangles of military heroes, nor bear arms upon bloody battle fields; their weapons were ideas, and they won supremacy

by skillfully acting upon the faith, hopes, fears, affections, and ideals of mankind

and through constancy to imperial ideas brought states and empires into being and power. The volume is entitled, *The Establishment of Terri-*

torial Sovereignty, it begins with the semi-independent powers and follows historically the international development of Europe, clearly indicating the spiritual forces that were dominant and persuasive in evolving these powers into modern states. There were wars and bloody battles in this process, enough of them, but behind it all and through it all there was the ever present designer, in the shadows perhaps, weaving the threads of black and white, red and gold, into the tapestries which were to be the "covering of earth." These designers were not always far-sighted; the ends they sought were not always wise or patriotic, but they ruled men and nations by their intellectual power and their ability to make their own ideas prevalent. It is the conflict of ideas and the triumph of policies that is supremely interesting, and the ends attained through these intellectual forces are far more important and enduring than are the results secured by war. They have fewer wrongs to be avenged, no wounds to be healed. The lesson to be learned out of it all is that these intellectual forces are greater than armies; and the results of diplomacy are more far-reaching than of those merely physical activities represented in the movements of armies and navies. Reading this volume with this understanding of its purposes; considering these spiritual influences as the essence of diplomatic action, we find this history, like Elisha's mountain, full of horses and chariots of fire. This volume begins with the Anglo-French quarrel (1313), and ends with the congress and peace of Westphalia (1648). It deals with the relations of France, Spain, Germany, England and Italy, the growth of the reformation and the development of early permanent international traditions.

Italy was the battlefield but the prize * * * was the primacy of Europe.

At the beginning of this period the papal mediation and influence are clearly and impartially told. Then follow the decline of the papal power, the passing of mediævalism and the rising of national sentiments and life.

The important part which commerce and trade played in strengthening national power and bringing about negotiations and treaties, those products of diplomacy, is well illustrated in the account of the rise of the Hanseatic league, a

government without territory, an influence surpassing that of most of the kingdoms within whose borders it carried on trade.

It maintained armies and navies, and was a power that existed for years, and while it may not have been a determining force in national development, it taught the nations the necessity of conserving commercial

interests and giving at least police protection to commercial activities. The material side of civic life then began to receive attention from governments, and the church, which had sought world-wide dominion, had to give way in the field of organized governments to the nations then rising into life and power. With the French expansion, Italian diplomacy, that is, Italian methods and conceptions, began to extend over Europe, bringing about a gradual transformation. "Political equilibrium," which had served to preserve the peace of Italy, became a political theory among the nations of Europe, and, perhaps, their only hope of safety. Diplomacy thus worked out the problem of controlling nations by intellectual association. The struggle for supremacy in Italy and the international influence of the reformation are told with an accuracy and clearness that hold the reader's attention and make the influence and power of diplomacy apparent at every point. The rise of the city-states in Italy and the national monarchies in Europe produced some new political theories and opened a wide field for diplomatic activity. Machiavelli's political philosophy (?) receives attention and at least one good result of his works is discovered by Doctor Hill. He says:

By systematically epitomizing the theory of personal despotism, Machiavelli made an important contribution to its final overthrow.

The last chapter gives the conception of the state as sovereign, the genesis of international jurisprudence, and the significance of the Thirty Years' War. The volume concludes with the inception, organization and conclusion of the congress and peace of Westphalia.

The facts of history are given in a clear, dispassionate and interesting style characteristic of Doctor Hill's treatment of historical matter. The actors are all upon the scene and their parts are well spoken while the spiritual forces are prominent factors before the reader.

This work is a large contribution to systematized knowledge, giving a clear conception of the field of diplomacy and strengthening the faith that the day will come when all international relations will be fixed and governed by diplomatic intercourse. The international policemen, armies and navies, will still be needed for the lawless, the revolutionist and the pirate, but the law-abiding people of every civilized country will settle their international differences by peaceful methods and before international tribunals. This is the final goal of diplomacy.

CHARLES WILLIS NEEDHAM.

Droit International. Les lois de la guerre et la neutralité. Par Fernand Verraes. (Bruxelles: Schepens. 1906. 2 vols.) In his preface, M.

Verraes says that it is a fundamental error to deduce international law from international practice; in his view, international law is a moral science in which

practice alone has real value when it is founded on justice and reason; reason and conscience have here, as for other branches of law, supreme authority.

A work constructed on these principles may have some value as a treatise on international morality; it is not international law. The author neglects the precedents of international practice and constructs a treatise which mingles in a confused mass what is international law and what he thinks should be international law. The result is worthless for practical purposes. The work is also open to the criticism of lack of proportion; some important subjects are omitted, and others are inadequately discussed; the treatment of the law of war on land is the best in the work, for here the author deals with the positive principles laid down by the Hague convention for the regulation of that subject.

Older treatises are freely quoted where they sustain the author's views, but there is practically no reference to later treatises, or to recent monographic literature. Such works as Perel's *Das internationale öffentliche Seerecht*, and Kleen's *Lois et usages de la neutralité* could have been consulted to much advantage.

W. F. DODD.

Lettres et papiers du Chancelier Comte de Nesselrode. 1760-1850. Publiés et annotés avec une introduction par le comte A. de Nesselrode. (v. 1-4. Paris: A. Lahure. 1904-05.) The publication of Nesselrode's papers and correspondence is an important event in the field of European diplomatic history of the nineteenth century. The first four volumes reach 1812, hardly the beginning of Nesselrode's important diplomatic career, and the later volumes will be awaited with much interest.

La doctrine de Monroe et l'Amérique Latine. Par Daniel Antokoletz. (Paris: Emile Larose. 1905. pp. iii, 208.) This is a doctoral dissertation written in a spirit decidedly hostile to the United States. The author regards the policy of the United States as one of constant aggression against the weaker American states. His positive suggestions are embodied under the title *Le péril nord-américain et son remède possible*, in which he urges the formation of a confederation of the states of Central and South America.

Commerce in war. By L. A. Atherly-Jones, assisted by H. H. L. Bellot. (London: Methuen and Co. 1907.) This work it intended, in the words of the authors,

to provide a full exposition of the rules of international law which govern the commercial relations of the subjects of neutral and belligerent states.

It will be reviewed in a later number of the JOURNAL.

Volume ii, no. 4 of the *Revista de derecho internacional y política exterior* is given up almost entirely to papers upon the Moroccan conference at Algeciras.

La codification du droit international privé. Bulletin des conférences de la Haye, is a new periodical publication in the field of private international law. It is edited by the well-known scholar, T. M. C. Asser, and is published at the Hague by Helinfate, under the auspices of the government of the Netherlands.

Professor E. J. Benton of Adelbert College is Albert Shaw lecturer upon international law and diplomacy at the Johns Hopkins University for 1906-1907. His lectures upon *Questions of International Law and Diplomacy involved in the Spanish-American War* will be issued in book form by the Johns Hopkins University Press.

Professor Joseph Delpech has an extensive article in the *Revue Générale de droit international public* for November-December, 1906, upon the recent conference (June-July, 1906) for the revision of the Geneva convention. The article covers nearly a hundred pages and forms an extensive commentary upon the work of the conference.

A recent German work which should be of much interest to Americans is: *Fahnenflucht und Verletzung der Wehrpflicht durch Auswanderung. Eine rechtswissenschaftliche und politische Studie zu den Deutsch-amerikanischen Bancroftverträgen*, by Ludwig Bendix. (Leipzig: Duncker and Humboldt. 1906. pp. xxx, 540.) This book will be reviewed in a later number of the JOURNAL.

Ernest Denis, *La fondation de l'empire allemand*. (Paris: Armand Colin. 1906. pp. viii, 528), is largely a study of the diplomatic history of the unification of Germany.

Das Kriege recht zu Lande in seiner neuesten Gestaltung by Albert Zorn (Berlin: Heymann. 1906), will be reviewed in a later number of the JOURNAL.

The History of the Papacy in the XIX Century, by Dr. Fredrik Nielsen Translated under the direction of Arthur James Mason. (New York: E. P. Dutton and Co. 1906. 2 vols.) This is a translation of

a work by a learned Danish scholar. The history has reached the year 1878, and another volume is planned to cover the papacy of Leo XIII. The volumes now translated contain much of interest to the student of recent diplomatic history.

Reviews will appear in a subsequent number of the JOURNAL of the following works:

International Law. A treatise by L. Oppenheim, LL.D. 2 vols., 1905-1906. Longmans, Green and Company.

The International Law and Diplomacy of the Russo-Japanese War. By Amos S. Hershey, Ph.D. The Macmillan Company. 1906.

The Austinian Theory of War. By W. Jethro Brown. John Murray, 1906.

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